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775
No. 2183

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation,

Libelant,

vs.

THE STEAMSHIP "INDIANAPO-
LIS," her engines, boilers, tackle, ap-
parel and furniture,

Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,

*Claimant, Cross-Libelant and Cross-
Appellant.*

SUPPLEMENTAL APOSTLES ON APPEAL

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

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*In the District Court of the United States for the Western
District of Washington, Northern Division.*

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation.

Libelant,

vs.

THE STEAMSHIP "INDIANAPO-
LIS," her engines, boilers, tackle, ap-
parel and furniture,

Respondent.

No. 4484.

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,

*Claimant and Cross-Appellant and
Cross-Libelant.*

NAMES AND ADDRESSES OF COUNSEL.

IRA BRONSON, Esq.,

614 Colman Building, Seattle, Washington,
Proctor for Cross-Appellant, Cross-Libelant and Claimant.

WM. H. BOGLE, Esq.,

610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

CARROLL B. GRAVES, Esq.,

610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

F. T. MERRITT, Esq.,

610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

L. BOGLE, Esq.,

610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

In the United States District Court for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTA- TION COMPANY, a Corporation, <i>Libelant,</i>	}	No. 4484.
vs.		
THE STEAMSHIP "INDIANAPO- LIS," her engines, boilers, tackle, ap- parel and furniture, <i>Respondent,</i>		
INTERNATIONAL STEAMSHIP COMPANY, a Corporation, <i>Claimant and Cross-Libelant.</i>		

PETITION FOR APPEAL.

To the Honorable Judge of said Court:

International Steamship Company, a corporation, claimant and cross-libelant herein, respectfully shows, that on or about the 6th day of January, 1911, the Kitsap County Transportation Company, a corporation, exhibited its libel in the District Court of the United States, for the Western District of Washington, Northern Division, sitting at Seattle, against the Steamship "Indianapolis," her engines, boilers, tackle, apparel and furniture, in an action civil and maritime, for damages for collision between the steamer "Kitsap," owned by said libelant, and the said steamship "Indianapolis," owned by International Steamship Company, a corporation, claimant and cross-libelant herein, and praying among other things for the relief set forth in said libel that said steamship "Indianapolis" be condemned to pay the demand of said libelant and the costs in said libel mentioned.

That process issued out of said court having been served on said steamship "Indianapolis," the said International Steam-

ship Company, as owner and claimant did thereafter file its answer to the said libel in the said District Court, and also file its cross-libel against the said steamer "Kitsap," owned by the said Kitsap County Transportation Company, in which answer and cross-libel said claimant and cross-libelant prayed that the said original libel be dismissed with costs, and that the said steamer "Kitsap," her engines, boilers, tackle, apparel and furniture, be condemned to pay the demands of said cross-libelant and the costs upon said cross-libel, as by reference to said libel, answer and cross-libel will more fully appear.

That the said cause came on to be heard before the said Honorable C. H. Hanford, one of the Judges of said District Court, on or about the 8th day of November, 1911, upon the pleadings and proof taken in said cause by the respective parties. And the said Judge on or about the 28th day of May, 1912, made and filed a memorandum decision on the merits on said cause whereby it was, among other things, found and decreed that the collision mentioned in the pleadings resulted from the mutual fault of said steamer "Kitsap" owned by the said libelant, and the steamship "Indianapolis" owned by the said cross-libelant, and that there should be a division of damages resulting from said collision, and that the damages sustained by said steamship "Kitsap" resulting from said collision amounted to the total sum of Thirty-two Thousand Six Hundred Sixty-six and $87/100$ (\$32,666.87) Dollars, and that the damages to said "Indianapolis" resulting from said collision amounted to the total sum of Five Thousand Four Hundred Fifty-one and $50/100$ (\$5,451.50) Dollars, and that on a division of said damages, the said claimant and cross-libelant should pay to said libelant the sum of Thirteen Thousand Six Hundred Seven and $68/100$ (\$13,607.68) Dollars, but that neither party to said action should be entitled to recover costs therein, and no interest should be allowed either party.

And it was further found by said Court that the said libel-

ant as a part of said damage was entitled to damages in the nature of demurrage for a period of one hundred thirty-nine (139) days consumed in making temporary and permanent repairs to said steamer "Kitsap" as a result of said collision, said damages in the nature of demurrage being fixed at the rate of Fifty Dollars (\$50.00) per day.

And after the making and filing of said memorandum decision, and before the entry of final judgment in said cause, the said C. H. Hanford having resigned as one of the Judges of the above entitled Court. Thereafter and on the 15th day of August, 1912, a final decree in said cause was made and entered by the Honorable E. E. Cushman, one of the Judges of said Court, in accordance with said memorandum decision.

And this appellant is advised and insists that said decree is erroneous, inasmuch as the said collision did not result from the mutual fault of said steamer "Kitsap" and the said steamer "Indianapolis," but did result from the sole fault of said steamer "Kitsap"; and also inasmuch as the said court refused to award to the claimant and cross-libelant the full amount of the damage sustained by the claimant and cross-libelant for all of the injuries, damage and loss resulting from said collision to the said steamship "Indianapolis," and also for the reason that said court found and decreed that this petitioner should pay one-half of the damage found to have been sustained by said steamer "Kitsap" as a result of said collision; and also refused to allow your petitioner its costs in said cause, but decreed that neither party should recover costs herein.

And this appellant for this and other reasons appeals from the whole of said decree to the United States Circuit Court of Appeals to be held in the city of San Francisco, California, for the Ninth Circuit, and prays that the said decree may be modified and corrected and that this cross-libelant may have a decree against said Kitsap County Transportation Company, a corporation, libelant, for the full amount of the damage sustained by said cross-libelant and resulting from said collision, or such other decree made as to the said United States Circuit Court

of Appeals may seem just, and that the said Kitsap County Transportation Company, a corporation, be ordered to pay to the cross-libelant its costs and damages in the premises.

IRA BRONSON,

Proctor for Claimant, Cross-Libelant and Cross-Appellant.

Due service of the foregoing petition for appeal is hereby admitted this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Libelant.

Indorsed: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,

Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,
Claimant and Cross-Libelant.

No. 4484.

ORDER ALLOWING APPEAL.

This cause having come on to be heard on this 26th day of September, 1912, upon the petition of International Steamship Company, a corporation, cross-libelant in the above entitled

cause for an appeal from the decree of this court made and entered on the 15th day of August, 1912, wherein and whereby it was decreed that the collision mentioned in the pleadings herein resulted from the mutual fault of the Steamer "Kitsap" and the Steamship "Indianapolis," and that the damage resulting therefrom should be divided, and upon such division decreeing that the said Kitsap County Transportation Company should have and recover from the said claimant and cross-libellant and the stipulators upon the release bond given herein, the sum of Thirteen Thousand Six Hundred Seven and 68/100 (\$13,607.68) Dollars, and that neither party should recover costs in this action; and it appearing from such petition for an appeal that the said decree has been duly filed with the Clerk of this Court, and the Court being duly advised in the premises;

IT IS HEREBY ORDERED AND DECREED that the said International Steamship Company be, and hereby is, allowed an appeal from said decree as aforesaid, and that the appeal bond to be given on said appeal be fixed at the sum of Two Hundred and Fifty Dollars.

EDWARD E. CUSHMAN,
United States District Judge.

O. K. Bogle, Graves, Merrit & Bogle, Proctors for Libellant.

Indorsed: Order Allowing Appeal. Filed in the U. S. District Court Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTA- TION COMPANY, a Corporation, <i>Libelant,</i>	}	No. 4484.
vs.		
THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture, <i>Respondent,</i>		
INTERNATIONAL STEAMSHIP COMPANY, a Corporation, <i>Claimant and Cross-Libelant.</i>		

NOTICE OF APPEAL.

To Kitsap County Transportation Company, a Corporation, Libelant; and to Bogle, Graves, Merritt & Bogle, Proctors for Libelant; and to Frank L. Crosby, Clerk of said Court:

You, and each of you, will please take notice that the International Steamship Company, a corporation, claimant and cross-libelant herein, hereby appeals from the final decree made and entered herein on the 15th day of August, 1912, in favor of the libelant and against this claimant and cross-libelant, and the stipulators for the release of the steamship "Indianapolis," for the sum of Thirteen Thousand Six Hundred Seven and 68/100 (\$13,607.68) Dollars, without costs, and from each and every part of said decree, to the next United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in and for said Circuit at the city of San Francisco, State of California.

Dated at Seattle, Washington, September 25th, 1912.

IRA BRONSON,
Proctor for Claimant and Cross-Libelant.

Due service of the foregoing notice of appeal, after the filing of the same in the office of the Clerk of the above entitled Court, is hereby admitted by the Proctors for Libelant this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,
Claimant and Cross-Libelant,

No. 4484.

BOND ON APPEAL.

Know All Men by these Presents:

That we, INTERNATIONAL STEAMSHIP COMPANY, a corporation, claimant and cross-libelant, as principal, and Joshua Green of Seattle, Washington, and Frank E. Burns of Seattle, Washington, as sureties, are held and firmly bound unto the Kitsap County Transportation Company, a corporation, in the sum of Two Hundred and Fifty (\$250.00) Dollars,

lawful money of the United States to be paid to said KITSAP COUNTY TRANSPORTATION COMPANY, a corporation, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated at Seattle this 25th day of September, 1912.

WHEREAS, the said International Steamship Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 15th day of August, 1912, and having duly filed its assignment of errors in the office of the Clerk of said Court, and having filed its petition for such appeal which was duly allowed by said Court, and a citation was duly issued in said cause on such appeal.

NOW, THEREFORE, the condition of this obligation is such that if the above named International Steamship Company, a corporation, cross-appellant in said cause, shall prosecute said appeal with effect and pay all costs that may be awarded against it as such cross-appellant if the appeal is not sustained, and shall abide by, fulfill and perform whatever judgment and decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

INTERNATIONAL STEAMSHIP COMPANY.

By Joshua Green, President.

C. H. J. Stoltenberg, Secretary.

JOSHUA GREEN,

FRANK E. BURNS.

Sealed and delivered, and taken and acknowledged this 25th day of September, 1912, before me.

(Seal)

ROBERT W. REID,

Notary Public in and for the State of Washington,
residing at Seattle.

United States of America,
State of Washington,
County of King—ss.

JOSHUA GREEN and FRANK E. BURNS, being duly sworn, each for himself and not one for the other, deposes and says: That he resides in the Western District of Washington; that he is worth the sum of Five Hundred (\$500.00) Dollars over and above all his just debts and liabilities, and exclusive of property exempt from execution.

JOSHUA GREEN,
FRANK E. BURNS,

Sworn to this 25th day of September, 1912, before me.

(Seal)

ROBERT W. REID,

Notary Public in and for the State of Washington,
residing at Seattle.

The foregoing bond approved as to form, amount and sufficiency of sureties.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Kitsap County Transportation Company,
Appellant and Appellee.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation,

Libelant,

vs.

THE STEAMSHIP "INDIANAPO-
LIS," her engines, boilers, tackle, ap-
parel and furniture,

Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,

Claimant and Cross-Libelant.

No. 4484.

ASSIGNMENT OF ERRORS ON BEHALF OF CROSS- LIBELANT AND RESPONDENT.

Comes now the above named International Steamship Company, a corporation, cross-libelant and respondent in the above entitled cause, and says that in the record and proceeding in said cause, and in the decree made and entered therein on the 15th day of August, 1912, there are manifest errors in the following particulars:

I.

That the Court erred in finding and decreeing that the collision mentioned in the pleadings between the Steamer "Kitsap" and the Steamship "Indianapolis" resulted from the mutual fault of said Steamer "Kitsap" and said Steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said Steamer "Kitsap."

II.

That the Court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the

pleadings therein, should be divided, and that the libelant should recover one-half of the damage sustained by it and resulting from said collision; and that the cross-libelant and respondent should pay to the libelant one-half of the damages to said Steamer "Kitsap" found to have resulted from said collision, and in refusing to award to the cross-libelant and respondent all of the damages resulting to the Steamship "Indianapolis" from said collision.

III.

That the Court erred in allowing to the libelant in any event any part of the sum of Twelve thousand seven hundred twelve and 20/100 (\$12,712.20) dollars for the salving of the Steamer "Kitsap."

IV.

That the Court erred in not awarding to the cross-libelant and respondent the full damages sustained by the cross-libelant and respondent for all of the injuries, demurrage and loss resulting from said collision to said Steamship "Indianapolis."

Wherefore, the cross-libelant and respondent prays that said decree may be reversed, modified and corrected in the matters and things above set forth, and that such decree may be entered herein as shall meet with the approval of this Honorable Court and as shall do justice between the parties herein.

IRA BRONSON,
Proctor for Cross-Libelant and Respondent,
International Steamship Company.

Due service of the foregoing Assignment of Errors is hereby admitted this 25th day of September, 1912.

BOGGLE, GRAVES, MERRITT & BOGGLE,
Proctor for Libelant.

Indorsed: Assignment of Errors on Behalf of Cross-Libelant and Respondent. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

KITSAP COUNTY TRANSPORTA- TION CO.,	} No. 4484.
<i>Libelant,</i>	
vs.	
STEAMSHIP "INDIANAPOLIS," etc.,	
<i>Respondent,</i>	
INTERNATIONAL S. S. CO.,	
<i>Claimant.</i>	

PRAECIPE.

To the Clerk of the Above Entitled Court:

You will please prepare Supplemental Apostles on Appeal which shall contain the following records:

Cross-Appellant's Notice of Appeal.

Bond on Appeal.

Petition for Appeal.

Order Allowing Appeal.

Citation on Appeal.

Assignment of Errors.

IRA BRONSON,
Proctor for Cross-Appellant.

Indorsed: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation,

Libellant,

vs.

THE STEAMSHIP "INDIANAPO-
LIS," her engines, boilers, tackle, ap-
parel and furniture,

Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,

*Claimant and Cross-Appellant and
Cross-Libellant.*

No. 4484.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 16 printed pages, numbered from 1 to 16, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of Proctor for Claimant, Cross-Appellant and Cross-Libellant, as the same remain of record and on file in the office of the Clerk of said Court, and that the same, constitutes the Supplemental Apostles on Appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing Supplemental Apostles on Appeal is the sum of \$22.20, and that the said sum has been paid to me by Ira Bronson, Esq., Proctor for Cross-Appellant, Cross-Libelant and Claimant.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 9th day of October, 1912.

S-e al

FRANK L. CROSBY, Clerk.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a Corporation,

Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,

Respondent,

INTERNATIONAL STEAMSHIP
COMPANY, a Corporation,

Claimant and Cross-Libelant,

No. 4484.

CITATION ON APPEAL.

The President of the United States to Kitsap County Transportation Company, a corporation, Libelant; and to Bogle, Graves, Merritt & Bogle, its Proctors herein, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty

days of the date hereof, pursuant to an appeal to the said Court duly filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the International Steamship Company, a corporation, is cross-appellant and you are cross-appellee, then and there to show cause, if any there be, why the decree of the District Court of the United States for the Western District of Washington, Northern Division, in the above entitled cause, dated August 15th, 1912, should not be reversed or corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward E. Cushman, Judge of the District Court of the United States for the Western District of Washington, Northern Division, at the City of Seattle, Washington, this 26th day of September, 1912.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western
District of Washington.

Due service of the within citation after the filing of the same, in the office of the Clerk of the above entitled Court is hereby admitted this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libellant.

Indorsed: No. 4484. In the District Court of the United States for the Western District of Washington, Northern Division. Kitsap County Transportation Company, a corporation, Libellant, vs. The Steamship "Indianapolis," etc., Respondent. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. Ira Bronson, Proctor for Claimant and Cross-Libellant, 614-618 Colman Building, Seattle.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

STEAMSHIP "INDIANAPOLIS,"
her engines, boilers, tackle, apparel
and furniture,

Respondent and Appellee,

INTERNATIONAL STEAMSHIP
COMPANY, a corporation,
Claimant and Cross-Appellant.

No. 2183.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant and Cross-Appellee

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,

Proctors for Appellant and Cross-Appellee.

SEATTLE, WASHINGTON

In the
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

STEAMSHIP "INDIANAPOLIS,"
her engines, boilers, tackle, apparel
and furniture,

No. 2183.

Respondent and Appellee,

INTERNATIONAL STEAMSHIP
COMPANY, a corporation,
Claimant and Cross-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant and Cross-Appellee

STATEMENT OF THE CASE.

This cause comes here on appeal by the Libelant below, and upon a cross-appeal by Claimant below, from a judgment rendered in the court below, in favor of Appellant and Cross-Appellee and against

Appellee and Cross-Appellant in a suit in admiralty for the recovery of damages caused by a collision between the Steamships "Kitsap" and "Indianapolis," in Elliott Bay, off the Seattle docks on December 14, 1910.

The libel (Record pp. 4-8) alleges that the Libelant was and is a Washington corporation and the owner of the Steamship "Kitsap" at the time of the collision, which vessel was used and employed in transporting passengers and freight between the City of Seattle, Washington, and other ports and places upon the waters of Puget Sound and its tributaries; that the Steamship "Kitsap" was a wooden vessel of the following registered tonnage: 195 gross tons, and 123 net tons; that she was 127.5 feet in length over all, had a beam of 22 feet and a depth of 7.5 feet, and that she was at the time of the collision stout, staunch and in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and men. That the Steamship "Indianapolis" was an iron or steel American vessel of about 189 feet in length, and was engaged in transporting freight and passengers between the City of Seattle, Washington, and the City of Tacoma, Washington.

That on Wednesday, December 14, 1910, at about 4:35 P. M., the "Kitsap" left her berth on the south side of Pier 4 in Seattle, on her regular voyage or run from Seattle to Liberty Bay; that a dense fog hung over Elliott Bay and the course of the steamer therein; that she backed from her berth at a point about opposite Pier 5, and then went ahead under slow bell, with helm hard astarboard, turning to her course to Four Mile Rock; her master was at her wheel in the pilot house, and her mate was on the bridge; a competent man was on the lookout, and they, as well as the rest of the crew, who were variously employed in their respective duties, were faithfully attending thereto.

That the vessel proceeded under slow bell, regularly sounding her fog signals, up to the time of the collision, and every precaution was being taken to avoid a collision during said time. Shortly after turning to her course, the fog signals of the "Indianapolis" were heard a little forward of the "Kitsap's" beam on the port side; that the "Indianapolis" was then inbound from Tacoma to the Colman Dock in Seattle; that the "Kitsap" after the "Indianapolis'" fog signals were heard on the "Kitsap," was a considerable distance northerly

from the proper and regular course of the "Indianapolis" from the bell-buoy off Duwamish Head to Colman Dock. That the "Kitsap" proceeded on her course at a speed of not over three or four miles an hour, regularly sounding her fog whistles, and all hands keeping a sharp lookout, and taking every precaution against collision, until it appeared that the "Indianapolis" was getting closer, when the engines of the "Kitsap" were stopped and alarm signals immediately sounded; that under these circumstances and conditions the "Indianapolis" suddenly appeared through the fog a short distance from the "Kitsap" and on her port side, coming at a high rate of speed and heading for the port side of the "Kitsap."

The libel also alleges that the master of the "Kitsap" at once ordered his engine full speed astern, which checked all forward movement of the "Kitsap," but that before she could gather sternway, the "Indianapolis," without changing her course or checking her speed to any apparent extent struck the "Kitsap" on the port side just back of the pilot house, cutting into the hull of the "Kitsap" several feet; that the "Indianapolis" backed away from the "Kitsap," and then put her bow against

the "Kitsap" just forward of the cut, and all the passengers and crew of the "Kitsap" were transferred to the "Indianapolis," and that shortly thereafter the "Kitsap" sank by reason of the injuries received in such collision, and became and is a total loss.

The libel also alleges that the collision was in no way due to any fault on the part of the "Kitsap," which was carefully operated, nor of her officers or crew, but was due wholly to the fault of the "Indianapolis," in that she was navigated at too great speed in the fog, close to the docks in the crowded harbor, where it was known to those in charge of the "Indianapolis" that vessels were leaving the docks at all times; also in that she did not give proper heed to the fog signals of the "Kitsap," and that she did not go under the stern of the "Kitsap," as under the collision rules she should have done; and also in that she did not stop and reverse her engines in time, as she should have done, and in that she was in other respects improperly and carelessly navigated.

The libel alleges the damages to the "Kitsap" in the sum of Fifty Thousand Dollars (\$50,000.00).

Upon the filing of the libel on January 6, 1911, a monition and attachment was duly issued out of the said court and delivered to the United States Marshal, who thereafter seized the "Indianapolis" and made due return of the writ.

The International Steamship Company, Appellee and Cross-Appellant herein, duly appeared and filed its claim as owner of the "Indianapolis," and procured her release upon bond. Thereafter, Claimant filed an answer to the libel (Record pp. 14-16), which is practically a denial, either positive or on information and belief, of the allegations of the libel, except as to the ownership and size of the "Kitsap," the size of the "Indianapolis," and the fact that the vessels were in collision in a heavy fog at the time and place alleged.

The Appellee, as the owner of the "Indianapolis," also filed a cross-libel against the "Kitsap" (Record pp. 9-11), in which it is alleged that Cross-Appellant was and is an Oregon corporation, and the owner of the "Indianapolis," which vessel was used and employed in transporting passengers and freight between Seattle and Tacoma, Washington; that the "Indianapolis" at the time of the collision was stout, staunch and in all respects well manned.

tackled, appareled and appointed, and had the usual and necessary complement of officers and men; that the "Kitsap" is an American vessel regularly engaged in transporting passengers and freight between Seattle and other ports on Puget Sound.

The cross-libel further alleges that on December 14, 1910, the "Indianapolis" left her berth at Tacoma at 3 o'clock P. M. on her regular trip to Seattle, running in clear weather until near Duwamish buoy; that near that locality the "Indianapolis" sighted a slight fog, whereupon she reduced her speed, increasing it momentarily as the fog lifted, but almost immediately reducing it upon sighting a second fog bank ahead; that said steamer entered the fog bank under a slow bell, and regularly sounding her fog signals as required by law; that her master was at her wheel, her mate upon the bridge, and a competent man was upon the lookout, and that each and all were faithfully attending to their respective duties at all of said times. That soon after entering the second fog bank the master of the "Indianapolis" heard the whistles of the "Kitsap" at a distance off the port bow, and that shortly after, he heard the whistles nearly ahead but still a considerable distance away, whereupon

he caused the engines of the "Indianapolis" to be stopped. That subsequently he heard the "Kitsap's" whistles to starboard, upon which he ordered half speed astern, and upon again hearing her whistle and apparently growing nearer ordered full speed astern. That almost immediately, sighting the "Kitsap" through the fog, the master of the "Indianapolis" blew alarm whistles and used all reasonable methods to avoid collision, notwithstanding which a collision took place, resulting in injury to the "Indianapolis" and in the sinking of the "Kitsap."

The cross-libel alleges that the collision and resulting damage was in nowise due to the fault of the "Indianapolis," which was carefully and prudently managed, and upon her usual and proper course to her dock, nor to any fault of her officers or crew, but that it was wholly due to the fault of the "Kitsap" in that she was navigating at too great speed in the fog; in that she did not give proper heed to the signals of the "Indianapolis," and more particularly in that, although those in charge of the "Kitsap" knew that the "Indianapolis" was coming up to her dock in a dense fog, the "Kitsap" was navigated upon a course which would twice

carry her between the "Indianapolis" and said dock, that is, it should twice take the "Kitsap" across the bows of the "Indianapolis."

The damage to the "Indianapolis" is alleged at the sum of Fifty Thousand Dollars (\$50,000.00).

The Libellant answered the cross-libel (Record pp. 12 and 13), denying any knowledge or information of the allegations as to the actions of the "Indianapolis," denying the allegations of care on the part of the "Indianapolis" and of negligence on the part of the "Kitsap," as well as the damage alleged to have been sustained by the "Indianapolis."

The cause was duly referred by the District Court to a Commissioner to take and report the testimony therein; and all evidence in the cause on behalf of both parties was taken before the Commissioner, and on October 20, 1911, returned by him to the court, together with the exhibits offered. (Record p. 431).

The case was argued before Honorable C. H. Hanford, Judge of the District Court for the Western District of Washington, on November 8, 1911, upon the evidence taken before the Commissioner

and the exhibits offered. Said Judge thereafter, and on May 28, 1912, filed a memorandum decision (Record pp. 432-434), in which he found among other things, as follows: That the "Kitsap" left her dock at 4:35 P. M., backing away from the south side of Pier 4, under a slow bell, sufficient to clear the face of the docks, then reversed and went ahead *curving to starboard, until she came around on her regular course* headed for Four Mile Rock on the north shore of the harbor. That the "Indianapolis" was a much larger vessel than the "Kitsap," with a steel hull, and that at 4:33 P. M. she was coming from Tacoma and near the bell-buoy off Duwamish Head on the west side of Seattle harbor, and was running at reduced speed, but that she then increased to full speed, which was fifteen knots per hour or approximately fifteen hundred feet per minute. That from the time the "Kitsap" started both vessels were giving fog signals by blasts of their whistles at intervals of from ten to twenty seconds. That the time of the collision was 4:40 P. M. The Court found the point of collision to be opposite the slip between the Grand Trunk and Colman Docks, about 1500 feet from the end of the docks, and about 10,500 feet from Duwamish Head,

and that it required seven minutes for the "Indianapolis" to run this distance from Duwamish Head to the point of collision at her maximum speed.

The Court also found that no attempt was made on either vessel to avoid the collision by operating the helm to change her course so that when the vessels came together they were on converging lines—the "Kitsap" headed obliquely across the bow of the "Indianapolis." That the "Indianapolis" rammed the "Kitsap" on her port side in the vicinity of her pilot house, and cut into her hull to a depth of about seven feet. The Court also found as a fact, that at the moment of the impact, both vessels were moving ahead with considerable momentum, and rejected as untrue all evidence to the contrary, and found that both vessels were at fault. The Court found the damage to the "Kitsap", from the uncontradicted evidence, to be a total of \$32,666.87, including demurrage for the "Kitsap" during the time repairs were being made. The Court found the damage to the "Indianapolis," including demurrage, at a total of \$5,451.50, making a grand total of \$38,118.37, which the Court found

should be divided, and that neither party should recover costs.

Thereafter, and on August 15, 1912, a final decree in accordance with such memorandum decision was signed and filed, the same being signed by Honorable Edward E. Cushman, Judge of said court, Judge Hanford having resigned as Judge of said court prior to the entry of a final decree in the case.

This Appellant took this appeal from the final judgment on August 15, which appeal was duly perfected, and the Apostles on Appeal prepared, certified and printed. On September 25, 1912, Claimant and Cross-Libelant also appealed from the final decree. This cause comes here upon the appeal of the Libelant and the cross--appeal of the Claimant from such final decree.

The testimony in this case is voluminous, and the decision on this appeal will depend largely on the conclusion this Court reaches from this evidence, as to the fault causing the collision in question, and our argument will therefore, consist principally of a discussion of the evidence. We will not at this time point out the evidence we rely

upon for a reversal of the decree of the lower court, but will try to make a statement of the material, admitted or undisputed facts in the case, and our claim as to the proven facts in dispute, to aid the court in understanding the issues to be determined. In our argument, we will refer to the evidence we claim sustains our position in the case, and which we rely upon in asking this Court for a larger decree against the Appellee.

The steamer "Kitsap" is a wooden vessel of 195 gross tons and 123 net tons. She was 127.5 feet in length over all, and had a beam of 22 feet, and a depth of 7.5 feet (R. p. 5), and she weighed about from 125 to 150 tons (R. pp. 69 and 393). She was owned by the Kitsap County Transportation Company, a corporation, Libellant herein.

The steamer "Indianapolis" is a steel vessel (R. p. 415) of about 180 feet in length, 30 feet in breadth, and 8 feet mean draft, (her depth not appearing), and weighing about 493 tons (R. pp. 369, 393, 403). She was owned by the International Steamship Company, Appellee and Cross-Appellant herein. The "Indianapolis" at the time in question, was running regularly between Seattle and Tacoma, and the "Kitsap" was running between

Seattle and Paulsbo on Liberty Bay, an arm of Puget Sound. Both vessels had regular berths at docks in Seattle, the berth of the "Indianapolis" being at the outer face of the Colman Dock, and the berth of the "Kitsap" just before leaving on the voyage in question, being on the south side of Pier 4. The distance between these two piers is about 700 feet (Libelant's Exhibit J).

The regular course of the "Kitsap" from her berth at Pier 4 was to back around in front of Pier 5, and then go ahead, turning to starboard on to a course direct to Four Mile Rock, which is located between West Point and the docks in question. The regular course of the "Indianapolis" in coming from Tacoma, was to come around the bell-buoy just off Duwamish Head, opposite West Seattle, and then steer to a point between the Colman Dock and the Grand Trunk Dock, when she would change her course slightly and run in along the face of the Colman Dock.

During the afternoon of the day of the collision, a very dense fog hung over Elliott Bay. The "Kitsap" left her berth at 4:35 P. M., backing in front of Pier 5, and then going ahead and turning to starboard on to her regular course. The "In-

dianapolis" passed the bell-buoy at 4:33 P. M. The collision occurred at 4:40 P. M. Both vessels were being operated in the fog after the "Indianapolis" passed the bell-buoy, and both were regularly sounding fog signals. Neither vessel could be seen from the other until a very short distance apart. The "Indianapolis" struck the "Kitsap" on her port bow, just forward of her pilot house, cutting into her about seven feet, and causing her to sink within about twenty minutes. The "Kitsap" was afterwards located at a depth of about 238 feet, and subsequently raised and repaired.

There was no evidence offered by Appellee to contradict Appellant's testimony as to the amount of damage sustained by the "Kitsap." The only question raised by Appellee as to the amount of damages claimed by Appellant, was as to the basis upon which demurrage should be figured, and as to the item of \$1,500.00 claimed by the Appellant for damage to the boilers of the "Kitsap" by being submerged; the Court allowing Appellant only \$50.00 per day demurrage, instead of \$103.00 per day as claimed by it, and disallowing the item of \$1,500.00 damage to the boilers. Appellee also contests Appellant's right to recover for salvage of the

“Kitsap,” which was allowed by the trial court. Appellant offered no evidence to contradict the evidence of Appellee as to the damage to the “Indianapolis,” and the Court allowed such damage, estimating the demurrage due the “Indianapolis” on the same basis as it allowed demurrage to the “Kitsap;” that is, on the basis of the net earnings of the respective vessels as stipulated in the case.

The questions involved in this statement of facts and presented here by the Assignment of Errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellee will claim that the finding of the trial court that the “Indianapolis” was at fault is not sustained by the evidence. Appellant will claim that this finding is amply sustained by the evidence, and in fact, that no other finding could be made under the evidence.

II.

Appellant contends that the finding of the trial court that the “Kitsap” was at fault is not sustained by the evidence; but that the evidence shows clearly that the “Kitsap” was not at fault, that

she was operated with all proper care and caution, in strict accordance with the rules of navigation, and that the Court erred in finding the "Kitsap" at fault, and in decreeing that the damages caused by the collision should be divided.

Appellant's Assignment of Errors Nos. 1, 2, 6 and 7 will be discussed under this heading.

III.

The Court allowed Appellant only \$50.00 per day demurrage for the "Kitsap" during the period she was being raised and repaired; while Appellant claims that it was entitled to demurrage at the rate of \$103.00 per day, being the net charter value of the Steamer "Hyak," which was employed to take the run of the "Kitsap" during this period.

Appellant's Assignment of Error No. 3 will be discussed under this heading.

IV.

Appellant claimed \$1,500.00 for non-repairable damage to the boilers of the "Kitsap" by reason of the submersion, which the Court refused to allow.

Assignment of Error No. 4 will be discussed under this heading.

V.

The Court refused to allow any interest to Appellant on the sums expended by it in making repairs to the "Kitsap," or any interest prior to the date of the decree upon amounts due it.

Assignment of Error No. 5 will be discussed under this heading.

SPECIFICATIONS OF ERROR RELIED UPON.

I.

The Court erred in finding and decreeing that the collision mentioned in the pleadings between the steamship "Kitsap" and the steamship "Indianapolis," resulted from the mutual fault of said steamship "Kitsap" and said steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said steamship "Indianapolis."

II.

The Court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the pleadings should be divided, and that said libelant should recover only one-half of the damage sustained by it and resulting from said collision, and that said libelant should pay to the said International Steamship Company, claimant and cross-libelant herein, one-half of the damages of said steamship "Indianapolis" found to have resulted from said collision.

III.

The Court erred in finding the amount of damage in the nature of demurrage, to which said libelant was entitled, at the sum of Fifty Dollars (\$50.00) per day during the one hundred thirty-nine (139) days of detention of the steamship "Kitsap" resulting from said collision, and in refusing to award to said libelant damages in the nature of demurrage for the said detention at a higher rate or greater sum than Fifty Dollars (\$50.00) per day.

IV.

The Court erred in refusing to allow and award to said libelant, as a part of the damages sustained by it as a result of said collision any amount or sum for depreciation in the value of the boilers of said steamship "Kitsap" due to a submersion of said boilers, resulting from said collision.

V.

The Court erred in refusing to allow the Libelant any interest upon the sums expended by it for the repairs upon said steamship "Kitsap" resulting from said collision, and in refusing to allow any interest prior to the date of said decree upon

the amounts due to said Libelant from said Claimant and Cross-Libelant as damages resulting from said collision.

VI.

The Court erred in refusing to allow, award and decree to Libelant the full amount of damages sustained by it as a result of the collision between the said steamship "Kitsap" and the said steamship "Indianapolis" together with interest thereon and its costs upon said suit as prayed for in its said libel.

VII.

The Court erred in refusing to dismiss the cross-libel filed by said International Steamship Company in said cause.

ARGUMENT.

MOVEMENTS OF THE "INDIANAPOLIS."

We will first consider the course, handling and action of the "Indianapolis" from the time she rounded the bell-buoy off Duwamish Head, two miles from her berth and one and three-quarter miles from the point of collision, until the collision occurred, and see if there is any doubt as to her fault.

The "Indianapolis" left Tacoma on this run at her usual time. It was foggy leaving Tacoma (R. p. 141), but later it cleared somewhat, and was more or less clear until after the vessel passed Alki Point. At some place between Alki Point and the bell-buoy the "Indianapolis" ran into a fog (R. pp. 152, 173). Up to this time she was making schedule time, running full speed (R. 152). The master, who had been lying down, took charge at the bell-buoy. The fog was so thick that he could not see the buoy (R. pp. 142, 152, 153, 210). Just before leaving the bell-buoy the mate, who had been in charge of the vessel, slowed her down because of the fog (R. p. 153). He ran under a slow bell possibly half a minute, when the Captain gave or-

ders for full speed ahead, and he proceeded to run his vessel for five minutes at full speed, or fifteen knots an hour (R. pp. 143, 155, 160, 295), from the bell-buoy toward the crowded harbor of Seattle, in one of the densest fogs ever known on Elliott Bay, which, according to his own testimony, got thicker and thicker as he got nearer the City, where the smoke was mixed with the fog. He says that he did not hear any other whistles during this time, but the evidence of the witness Jacobs, for Appellee, who was a passenger on the "Indianapolis" and stood upon her upper deck, was that they heard whistles all the time (R. p. 213); and of the witness Percival, also for Appellee, was that they heard whistles all the way across (R. p. 253).

After running full speed for five minutes into this fog and covering a distance of one and one-quarter nautical miles (R. p. 143), Captain Penfield testified that at 4:38 he had the speed of the "Indianapolis" reduced to half speed (R. pp. 143, 155), which he says means that her engines were making 130 revolutions instead of 154, and that she would run twelve knots an hour instead of fifteen (R. p. 155). He testified that he then put her under slow bell, at which she would make

ninety turns, and that at 4:39 he stopped her engines (R. pp. 143, 158). He said he was positive that he stopped at 4:39, because he looked at the clock (R. p. 158). The next order that he says he gave was for slow astern (R. pp. 144, 158). He says he gave this slow speed astern bell about a minute after he stopped his engines, which would be about one minute after 4:39, or practically at the time of the collision (R. p. 159). Later he said that it was a few seconds before the collision (R. p. 164) . He says that he next gave orders for half speed astern (R. pp. 146, 163), and that next he gave orders for full speed astern (R. p. 163).

That these bells to reverse the engines were given within a few seconds of the collision, we think clearly appears from the evidence of both Captain Penfield and Mate Anderson. In fact, Captain Penfield testified that he saw the "Kitsap's" lights before he even gave the *half speed astern* order (R. p. 163). The mate says that he heard Captain Penfield sing out the order for *half speed astern*, and that "it was just when I seen the light" of the "Kitsap," (R. pp. 174, 179), and that the collision was almost immediately after (R. p. 178). In short, according to this evi-

dence of Captain Penfield, the "Indianapolis" ran five minutes at full speed or fifteen knots an hour, then at half speed, or twelve knots an hour for a fraction of a minute, and then at slow speed or 90 revolutions instead of 154, her full speed, for the balance of this minute. As witness H. A. Evans shows this slow speed at 90 revolutions would be at least $9\frac{1}{2}$ miles per hour (R. 353). Captain Penfield testified that next the engines were stopped and the vessel drifted with this momentum for a few seconds, depending on whether the collision was at 4:39½ or 4:40; then, although the "Kitsap" was heard all the time, ten or fifteen seconds before the collision, a *slow speed astern* bell was given, and after the "Kitsap" was seen 60 to 75 feet away, a *half speed astern bell* was given instead of a full speed astern, which was given later. Although Captain Penfield testifies that he gave these different bells, it must be remembered that there is no evidence in the record to sustain his statement that he ever gave a stop bell or a slow speed astern bell. The log was not produced, nor was the Quartermaster, who was at the wheel in the pilot house, sworn, or his absence accounted for, nor any other witness produced to corroborate this evidence. If

the bells were given, as Captain Penfield says, certainly the Quartermaster or some one in the engine room or on the boat could have so testified.

Engineer Thorn of the "Indianapolis" testified as to the bells he received and answered, and we wish to call particular attention to his testimony. He says they ran full speed to about the bell-buoy, then slowed to half speed, then proceeded at full speed again for about four minutes as nearly as he could recollect (R. p. 295). He says that he next got a slow bell; then a half speed astern bell, then full speed astern (R. pp. 295, 296, 297), the last just as he felt the impact of the collision (R. p. 297). He did not receive any stop bell nor slow astern bell, as testified by Captain Penfield. Proctor for Appellee put the word "stop" into the witness's mouth on re-direct, but it is evident that the witness meant the bell given near the buoy, which he first called a stop bell (R. p. 297), meaning a slow or half speed bell.

This evidence corroborates our contention that the "Indianapolis" was running full speed or nearly full speed until just before the collision. It was necessary for her to do so to cover the distance between the buoy and the point of collision, which

all the evidence shows was a nautical mile and three-quarters. The chart offered by Captain Penfield shows this distance (Claimant's Exhibit 4); it is also shown by his evidence that at the time of the collision he was just about the right place to haul to his dock (R. p. 169), which point he says took him seven minutes to reach from the buoy in fair weather (R. p. 161); the evidence of the witnesses for Appellant who stood on the docks, also those who were on the steamer "Reliance," and of Lieutenant Stewart and Harbor Master Hill all show the same thing, and the place where the "Kit-sap" was found was one and three-quarter knots from the buoy. All of this evidence will be particularly referred to and pointed out hereafter. To run one and three-quarter knots in the seven minutes between 4:33 and 4:40 required the "Indianapolis" to make her full speed all the time, just as she did in fair weather, because her full speed was one knot in four minutes or one and three-quarter knots in seven minutes.

There is also other evidence to sustain this contention. The witness Weld, for Appellant, was a passenger on the "Indianapolis" on this trip. He was sitting in the extreme stern of the "In-

dianapolis" over her wheel. He had had years of experience on board of steam vessels. He felt the impact of the collision with the "Kitsap," but prior to that time did not notice any difference in the motion or vibration of the "Indianapolis" from the time she left Tacoma (R. pp. 87-89). Of course, it will not be disputed that the backing of the engines of the "Indianapolis," whether she was drifting, at rest, or moving forward, would cause considerable vibration of the ship, which would be very noticeable to a person sitting over her wheel. In fact, the passengers who testified in behalf of Appellee, base their estimate of the speed of the "Indianapolis" on the vibration or want of vibration of the "Indianapolis." Certainly, if the engines of the "Indianapolis" were backed before the collision, the vibration would have been noticeable to Mr. Weld, and the fact that he did not notice this vibration until he felt the impact of the collision, corroborates the statement of Engineer Thorn, that he received the order for full speed astern just at the time he felt the collision; and also that of Mate Anderson, that he heard the order for half speed astern, which was given be-

fore the order for full speed, just at the time he saw the lights of the "Kitsap."

Witness Gilbert, for Appellant, who was also a passenger on board the "Indianapolis," was on the main deck near the engine-room, and he did not notice any difference in the motion or vibration of the ship, nor hear any bells given in her engine-room prior to the collision, the impact of which was sufficient to knock him out of his chair (R. pp. 114-118).

There is also the testimony of the witness Foster, for Appellant, who stood on the port side of the "Kitsap," just aft of the pilot house, and at the exact spot where the "Indianapolis" struck the "Kitsap." Foster heard the bells given on the "Kitsap" to back her; felt her shake while she was backing (R. p. 91); looked at the water and was satisfied that she was standing still at the time of the collision (R. p. 92); and says that the "Indianapolis" was coming "pretty speedy," "showing a big white foam of water on her bow," and that she struck the "Kitsap" at the point where he stood (R. p. 92). In fact, when he first saw her in the fog, he says she was aimed at where he stood, and she struck that very spot, where she

was aimed at, and that his parcels which lay at his feet, dropped into the hole made in the "Kitsap" (R. p. 92); which shows conclusively that it was not the "Kitsap" that was moving forward, but that the "Indianapolis" was the moving object, and the "Kitsap" was at a standstill, otherwise the "Indianapolis" would have struck back of that spot.

The witness Ole Tongerose, for Appellant, who was one of the look-outs on the "Kitsap," stood just forward of where the "Indianapolis" struck, and says that she was coming very fast (R. p. 83); and the witness Totland, for Appellant, the look-out on the "Kitsap" who stood in her bow, says the "Indianapolis" was running fast; that he heard "her noise in the water, and saw the foam under her bow" (R. p. 121). Captain Hanson testified that the "Indianapolis" had very good speed on (R. p. 33).

Probably the strongest evidence of the speed of the "Indianapolis" is the cut she made in the "Kitsap." This is clearly shown in the pictures offered in evidence (Libelant's Exhibits E, F, G and H), which correctly show the damage done to the hull of the vessel. This cut is mute but con-

vincing testimony in support of the evidence of the witnesses we have referred to, that the "Indianapolis" was the moving object, and that her speed at the time of the collision was considerable. As witness H. A. Evans testified, this cut could not have been made through the stout iron wood guard of the "Kitsap" and her heavy planking and timbers, if the "Indianapolis" had not considerable headway at the time of the collision (R. pp. 370-380). As shown by Mr. Evans in his testimony and as the Court well knows, if the "Indianapolis" had been standing still or had sternway at this time, it would have been impossible to cut into the "Kitsap" as she did, or in fact, at all.

Appellee, realizing the full importance of this evidence, seeks to avoid this conclusion, by inference rather than directly, that the cut was caused by the "Kitsap" "impaling" herself upon the bow of the "Indianapolis." This contention seems to us so absurd that we do not wonder that no witness was produced in behalf of the Appellee who was willing to express a positive opinion that the "Kitsap" did "impale" herself on the bow of the "Indianapolis," nor offer any reason to support any such contention. In fact, we do not think this con-

tention worthy of more than passing notice, and we think the clear explanation of witness H. A. Evans, of the effect of the "Kitsap" moving forward, striking the bow of the "Indianapolis" standing still (R. pp. 378-380), so completely answers any contention that she impaled herself on the "Indianapolis" that no further argument on this point is required.

"When a collision occurs, as here, by the stem of a sailing vessel striking the side of a barge lashed to a steam tug, and with such force as to split open a new and stanchly-built vessel, and cause her to sink in a few minutes, it is not difficult to ascertain which vessel ran into the other. To affirm that the sailing vessel was nearly, if not quite, stationary, and that the barge ran into her, is an appeal to human credulity which ought not to be attempted in an intelligent court."

Brooks vs. The D. W. Lenox, 4 Fed. Cas. No. 1952.

In further support of our position that the "Indianapolis" had been making great speed prior to the collision, and was making considerable speed at that very time, is the testimony of Mr. Evans, who took the evidence of Captain Penfield and plotted the same on a Government chart of Elliott Bay (Libellant's Exhibit M), and showed by mathematical calculation which cannot be, and

has not been disputed, that the speed of the "Indianapolis" was very considerable at the actual time of the collision, and that it had been very great just prior thereto (R. pp. 351-356). These are matters of pure mathematics. We have the "Indianapolis" at the bell-buoy at 4:33. The distance to the point of collision was $1\frac{3}{4}$ nautical miles; the collision occurred at not later than 4:40; she had to make this distance of $1\frac{3}{4}$ nautical miles in seven minutes; her maximum full speed was fifteen knots, and she ran at this speed for five minutes as testified to by Captain Penfield; it is therefore merely a question of calculation as to what average speed she must have made to cover the balance of the distance, or one-half mile, in the next two minutes, *which is also at the rate of fifteen miles per hour.*

Proctor for Appellee will undoubtedly attempt to avoid the effect of this evidence by saying that Mr. Evans took the course of the "Indianapolis" as N.E. by $E.\frac{1}{4}E.$ magnetic, from the bell-buoy, and that he also took the marks on the course plotted by Captain Penfield on Claimant's Exhibit 4, as the different positions of the "Indianapolis" at the times stated, and that Captain Penfield, as he

attempted to say when he was last called to the stand, was mistaken in saying that this course was a magnetic course, but meant a compass course; and that the positions indicated on this Exhibit 4 were not intended to be accurate positions from true measurements.

We think, however, the Court will be satisfied that the actual course of the "Indianapolis" at this time was not NE by $E\frac{1}{2}E$ magnetic. Captain Penfield testified that he had two courses, one a fair weather course, the other a foggy weather course, from the bell-buoy to the dock (R. pp. 142, 145, 418). He testified positively several times that his foggy weather course was NE by $E\frac{1}{4}E$ (R. pp. 142, 149, 419), and when Proctor for Appellee asked him if he meant a magnetic course, he said "Yes" (R. p. 149). Captain Penfield has been to sea, according to his own testimony, for thirty years (R. p. 141); he has been Master of ships for many years; Proctor for Appellee has had wide experience in shipping cases, and both Proctor and Captain Penfield well knew the difference between a magnetic course and a compass course, and there could be no question but that Proctor meant and Captain Penfield understood that the

course he was testifying to was a magnetic course. As he admitted on his cross-examination (R. pp. 420-422), if he had been testifying to a compass course, not having given the deviation of his compass, no one, not knowing the deviation, could tell what that course was, and he intended to give a course which anyone could understand and draw.

After testifying as to what his course was in foggy weather, and on this identical trip, he then offered in evidence a Government chart of the Bay (Claimant's Exhibit 4), on which he stated he had drawn this identical course (R. p. 149), but he marked that course NE by $E\frac{1}{2}E$, magnetic, instead of NE by $E\frac{1}{4}E$, as he had testified was the course he steered and was plotting on this chart. It was very apparent that he wanted it to appear from the chart that the course he steered took him to the Grand Trunk Dock instead of further north off Piers 4 or 5, as would have appeared if he had drawn on this chart a magnetic course NE by $E\frac{1}{4}E$; yet it would not have done to draw the half course and mark it a quarter course, as that difference would be easily seen.

It is very material whether the course he steered was a quarter or a half course, as the half

course would make him clear the ordinary course of the "Kitsap," while the quarter course would throw the ship considerably north of Pier 4, and across the course of the "Kitsap." This is clearly explained by witness H. A. Evans (R. p. 350), and shown on Libellant's Exhibit M.

When it was found that we had noticed the discrepancy in Captain Penfield's testimony, he did the only possible thing he could do to get out of this hole, and that was to claim that the deviation of his compass was a quarter of a point eastward, just the difference between the quarter and the half course, so that a compass course NE by $E\frac{1}{4}E$ would be identical with a magnetic course NE by $E\frac{1}{2}E$. He therefore came to the stand and testified that this was the deviation of the compass of the "Indianapolis," but was forced to admit that although he had been Master of the "Indianapolis" for four years, he had never swung the compass during that time, nor had it been swung (R. p. 415); and as any one at all familiar with navigation knows, it was absolutely impossible for him to know whether the deviation of his compass was one-quarter of a point or more or less; in fact, he said that at one time on this particular course the

compass course was the magnetic course, and therefore, there was no deviation at all (R. p. 423).

But when Captain Penfield gave this testimony, he apparently did not see the conclusion which necessarily followed therefrom. He testified positively that his fair weather course was NE by $E\frac{1}{2}E$ (R. pp. 142, 419); he also testified positively that he always ran by his compass in fair weather, and never by land marks (R. p. 147); so that if his fair weather course was NE by $E\frac{1}{2}E$, compass, and the deviation of his compass was one-quarter of a point easterly, then this was identical with a magnetic course *NE by $E\frac{3}{4}E$* , and this would carry him in fair weather a long distance south of the Colman Dock, where he berthed. When the questions were put to him which would show these facts, he saw at once the hole he was in, and he refused to answer until he had to (R. p. 422). All of this shows that he did not make a mistake when he testified that his course NE by $E\frac{1}{4}E$ was a magnetic course, and if it was such course, the course plotted by him on Claimant's Exhibit 4 was not the course he ran at this time; but that course, as the Court can easily see by placing a pair of parallel rulers on the chart, would have carried him to

Pier 4, as is shown by witness H. A. Evans on Claimant's Exhibit M, and if as Captain Penfield, when last on the stand admitted, he did not take the same departure from the bell-buoy in foggy weather that he took in fair weather, but that he went from two to three hundred feet outside the buoy, farther to the north (R. p. 418), then this course would have carried him that much farther north of Pier 4; it would have carried him to the exact spot where we say he was at the time of the collision, and where all Appellant's evidence places both vessels at that time. It would place him where the passengers on the "Reliance" heard the whistles, crash and voices; where Lieutenant Stewart heard the whistles; where Captain Hill heard the crash, and where the witnesses who stood on the ends of Piers 4 and 6 heard the collision; where the "Kitsap" would be, leaving when and as she did, making her usual turn, going her slow speed at sixty or sixty-five revolutions of her engines, and where the "Indianapolis" had no right to be running at such speed in such a fog, knowing the "Kitsap" was ahead on her starboard bow, all of which evidence will be particularly referred to hereafter.

Further, whether the course of the "Indianapolis" as plotted by Mr. Evans was her actual course at this time, or whether it was in fact a quarter of a point farther south, makes no difference, the distances on either course from the bell-buoy were the same; and whether the positions marked by Captain Penfield on Claimant's Exhibit 4 were in fact the actual positions of the "Indianapolis" at the different times stated by him, makes no difference. Mr. Evans did not base his testimony solely on these marks, but he did base it upon the evidence of Captain Penfield and the distance between the bell-buoy and the point of collision, wherever it might be, and then calculated where she must have been along either course, and at what speed she must have run to reach the point of collision. If she ran full speed for five minutes, and her full speed is fifteen knots an hour, then she ran one and one-fourth nautical miles in five minutes, and the point of collision, whether off Pier 5 or off the Colman Dock, was approximately one and three-fourths nautical miles from the bell-buoy, and the "Indianapolis" had to make this nautical half mile in the one and one-half or two minutes between 4:38 when Captain Penfield says she slowed

to half speed, or twelve miles an hour, and 4:39½ or 4:40, when the collision occurred, *which required the same speed.*

The Court knows that a vessel running five minutes at fifteen knots an hour, and then slowing to revolutions which ordinarily would drive her twelve miles an hour, would in fact, because of the momentum the ship already had, drive her more than twelve miles; and, even if later the engines were slowed to 90 revolutions, she would still have considerable headway, and she would carry this headway for a long distance, even if her engines were afterwards stopped, which the Engineer's evidence shows they were not, nor were they slowed to 90 revolutions.

Mr. Evans has given the average speed she must have made between 4:39 and 4:40, according to Captain Penfield's chart, as 9.18 knots, or approximately 10.5 miles an hour (R. p. 353). If this was the *average* speed, and her speed at 4:39 was twelve miles, she certainly had a great deal of speed at the time of the collision, even according to Captain Penfield's testimony.

We will not take the time to go into the evidence

of Mr. Evans on these various points, but would respectfully request the Court to carefully consider the same, together with the various exhibits introduced in connection with the evidence in behalf of the Appellant, and we feel satisfied that the Court will find Mr. Evans' conclusions are correct, and that our claim is correct that the "Indianapolis" at the very time of the collision, was moving as fast or faster than the "Kitsap" was moving at any time, and that her headway up to the very time of the collision had not been checked, nor had the reverse bells been given until within a *few seconds* of the collision. The "Indianapolis" therefore, was not under complete control during any of the time, after running into this heavy bank of fog outside the bell-buoy, until the collision occurred, as the law requires of vessels coming into a crowded harbor in a thick fog, where other vessels are coming and going, as they have a right to do at all times.

If we are correct in this conclusion, and the "Indianapolis" ran this speed, when, as testified by Captain Penfield and Mate Anderson, they had heard the fog whistles of the "Kitsap" at least two minutes before, and these fog signals, as they ad-

mitted, had been blowing regularly as required by the Rules, then there can be no doubt that the finding of fault on the part of the "Indianapolis" is amply sustained by the evidence,' and it would be useless for us to cite authorities to show that such action on the part of the "Indianapolis" was such gross carelessness as to render her liable in this suit. She violated the first part of Article XVI of the Rules of the Road. She also violated Article XIX of the Rules, because she had the "Kitsap" on her starboard bow for some time before the collision, and it was her duty to keep out of the way of the "Kitsap;" and she also violated Article XXIII, which required her to slacken her speed or stop or reverse.

MOVEMENTS OF THE "KITSAP."

Having considered the course, action and handling of the "Indianapolis" on this occasion, as shown by the evidence, we will next consider the evidence concerning the course, action and handling of the "Kitsap" from the time she left her berth until the collision took place.

The undisputed evidence shows, and the trial court found, that the "Kitsap" left the south side of Pier 4 at 4:35 P. M. There is positive testimony of witnesses who looked at clocks and watches that this was the correct time, and there is no claim that there was any difference between the clocks or watches from which this time was determined and the clock of the "Indianapolis," from which the times referred to in the testimony by Captain Penfield are taken; in fact, all parties agree that the collision occurred between 4:39 and 4:40 o'clock, according to the time of both boats, so that their time must have corresponded (R. pp. 37, 160).

The relation of Pier 4, from which the "Kitsap" left, to the Colman Dock at which the "Indianapolis" berthed, is clearly shown in Libellant's Exhibit J. There is no dispute but that the "Kitsap"

regularly sounded her fog whistles from the time she left the dock until the collision. On leaving the south side of Pier 4, the undisputed evidence is that the "Kitsap" backed around the steamer "Reliance," then lying at the end of Pier 4, on a star-board helm to in front of Pier 5 (R. pp. 28, 302, 318, 327, 328, 337). Her Master, Captain Hanson, a man of years of experience sailing on Puget Sound, was at the wheel in the pilot house; her mate stood in front of the pilot house on watch, and two competent seamen were on the forward deck on the look-out, and she had a full crew (R. pp. 26, 31, 68, 69, 82). The chief engineer was at the engine (R. pp. 101, 102).

It took about one minute under a slow bell to back from her berth to in front of Pier 5. By reference to Libellant's Exhibit J, also to Claimant's Exhibit 9, the Court will see that Pier 5 is the next dock north of Pier 4, and about one hundred feet distant, so that the "Kitsap" backed between three and four hundred feet. The evidence of the Master of the "Kitsap" was that he backed as he usually did; that he "didn't give a jingle bell at the dock" (R. p. 42), and that it took about a minute backing (R. p. 43). The engineer who was in charge

of the engines testified that he was working the engines on the spring line while lying at the dock, and that he got one bell to stop, and two to back up, and that he backed for about one minute (R. p. 60).

Witness Tongerose for Appellant, one of the lookout men on the "Kitsap," testified that she backed about half speed astern motion (R. p. 85). The witness Otho Anderson, for Appellant, fireman on the "Kitsap," who was in the fire-room next to the engine and in the same room, where he could hear the bells and see the engine, testified that one bell was given at the dock to stop, and two to back up, which the engineer answered; that the "Kitsap" was an oil burner, having two burners, and that only one was burning, and it was burning easy (R. p. 102); that if a full speed bell had been given, he would have had to turn on both burners to keep up steam (R. p. 106). There is no evidence to contradict this testimony, or to show that the "Kitsap" did not back slowly as stated by these witnesses.

After backing in front of Pier 5, the Captain gave one bell to stop and one bell to go ahead, and put his helm hard aport, and the vessel stopped and went ahead slowly, turning to starboard as indicated on Libellant's Exhibits J and M. The evi-

dence in support of this statement is also uncontradicted and seems conclusive to us. The Master stated positively that he gave one bell to stop and one to go ahead slow, and that she came ahead slow (R. pp. 29, 41, 43, 52). He testified that the "Kitsap" was making four or five miles an hour, while turning (R. p. 30); that she was handled so slow that he told the engineer to "go a little stronger" (R. pp. 50, 52), and that then she was going about five or six miles (R. p. 52). The engineer testified that he got one bell to stop and one to go ahead, and that he did stop and go ahead slow (R. p. 60). He says that he knows she was running slow by the way the engine was turning over; that it was making about sixty turns; that after about half a minute, "the Captain rang the gong and said 'a few turns more, a little stronger;'" that he "made it a little stronger," "about five more," and that she continued with sixty-five turns instead of 189 turns when running full speed, until he got a stop bell (R. p. 61).

Mate Welfare of the "Kitsap" testified that while the "Kitsap" was backing he stood on her stern, that he could hear the bells in the engine room, and that one bell to go ahead was given (R.

p. 68). He says the "Kitsap" was "running about four or five miles an hour, going very slow" (R. p. 69), and that a jingle meant full speed.

Look-out Tongerose testified that he looked at the water and that she was making three or four or five miles (R. p. 84). Witness Foster, for Appellant, who had had long experience at sea, and who stood on the main deck of the "Kitsap" next above the engine, just aft of the pilot house, heard one bell to go ahead (R. p. 90). Fireman Anderson of the "Kitsap" testified that they got a bell to go ahead, and he then came out of the fireroom and stood looking out of a port opposite the engine (R. p. 102); that the "Kitsap" was "running very slow" (R. p. 103); that he could tell this because he "could see the engine" and "had on one burner very easy and kept the steam up;" that there had been no bell to "hook on" from the time they got the one bell to go ahead until they got a stop bell before the collision (R. p. 104).

In addition to this evidence of those engaged in the actual operation of the "Kitsap," there is the testimony of eye witnesses who saw the "Kitsap" back away from the dock and come ahead making the turn to her course.

The "Reliance," which lay at the end of Pier 4, left just as the "Kitsap" was coming ahead. The "Reliance" backed and turned to a course for the bell-buoy, and was just astern of the "Kitsap" until after the "Kitsap" completed her turn (R. pp. 302, 303, 307, 319, 321, 328, 337). Witness M. B. Jackson for Appellant, was a passenger on the "Reliance," and he watched the "Kitsap" leave and turn until he saw her stern light as she was running at right angles to the "Reliance" (R. p. 303). He heard the danger whistles at the time of the collision, which he fixes at five or six minutes after the "Kitsap" left the dock (R. pp. 303, 306). Witness J. L. Shaw for Appellant, was a passenger on the "Reliance;" he saw the "Kitsap" leave, and watched her come ahead, turn and pass out of sight. He also heard the danger signals and heard Captain Hanson of the "Kitsap" shout after the collision (R. p. 319). He says the "Reliance" was going very slowly (R. p. 325). The "Kitsap" must have also been going slowly, if she had not gone so far before the collision but that voices could be heard on the "Reliance." Witness McDonald for Appellant, freight clerk on Pier 4, who stood at the end of that dock, heard the danger whistles, which ap-

peared off the end of Pier 5 (R. pp. 335, 336). Mr. Gazzam, President of Appellant Company, was also a passenger on the "Reliance." He watched the "Kitsap" leave and turn and go ahead, and testified that "both boats were going very slowly" (R. p. 337), "not to exceed five knots" (R. p. 343).

Witness H. A. Evans, for Appellant, plotted on Libellant's Exhibit J, the course of the "Kitsap" from her berth at the dock to the point of collision, according to the testimony given by the witnesses for Appellant, and, taking the undisputed time of her leaving as 4:35, and the admitted time of the collision as 4:39½ or 4:40, computed the average speed in making this distance as 3.9 statute miles per hour; taking the course of the "Indianapolis" as starting from the bell-buoy (R. p. 365). If, however, the "Indianapolis" was two or three hundred feet north of the bell-buoy when she passed it, then the point of collision was that much farther north, and the "Kitsap's" average speed would be a little over this figure. These calculations corroborate the testimony of the witnesses above referred to, and as this is merely a matter of calculation the court can easily satisfy itself that Mr. Evans was correct.

It would seem to us that the foregoing testimony as to the speed of the "Kitsap" should not only be convincing but conclusive in the case. This should be especially true as there is no evidence to the contrary, except persons on the "Indianapolis," and the witnesses who stood at the end of the Colman Dock and claim to have seen the "Kitsap" go south past that dock. The evidence of these latter witnesses we will discuss later, in connection with our argument as to the course of the "Kitsap," which Appellee claims took her further south than the testimony above referred to shows. If the "Kitsap" had greater speed than was testified to by Appellant's witnesses, it is strange that Appellee did not find some of the passengers or crew of the "Kitsap" who could have testified to that fact.

The only evidence introduced by Appellee to show that the "Kitsap" was going faster than is claimed by Appellant is the testimony of the following witnesses:

Captain Penfield of the "Indianapolis" testified that the "Kitsap" "was traveling a pretty good gait" (R. p. 147). He says that he could see her lights sixty to seventy-five feet away, and her hull thirty-five to forty feet away (R. p. 168); that he

was in the pilot-house of the "Indianapolis" some thirty feet from her bow, and of course, if the "Indianapolis" was moving forward to the point of collision, it would be hard for him to determine, especially in the excitement of the moment, whether the "Kitsap" was moving fast or at all, or whether it was the "Indianapolis" which was moving; and naturally his interest in clearing himself and fixing the fault on the "Kitsap" would affect his judgment on this question.

The mate of the "Indianapolis" testified that the "Kitsap" was "going a good clip" (R. p. 175); but as he did not hear any bells on the "Indianapolis," and could not testify as to her speed, he could not tell whether it was the motion of the "Kitsap" or of the "Indianapolis," and he is also an interested witness. Further, both these witnesses say they first heard the "Kitsap's" whistle at 4:38 (R. pp. 156, 177), which was only two minutes before the collision, and both claim the "Kitsap" was then on the port bow of the "Indianapolis" moving south. Even if this was correct, the "Kitsap" could not have followed any course claimed by Appellee and reached the point of collision in two minutes or less, even if she ran at full speed. On the other

hand, if the "Kitsap" took the course claimed by Appellant, and ran at any speed greater than that testified to by Appellants' witnesses, she would have passed the point of collision before 4:40.

The witness Jacobs, for Appellee, testified that the "Kitsap" was making considerable speed (R. p. 209). But he also testified that the "Indianapolis" seemed to have some headway. He stood on the upper deck of the "Indianapolis" back of the pilot-house, and we think a reading of his testimony as to the speed of the "Indianapolis," and as to other things which occurred, will satisfy the court that he knew very little about the speed of either vessel, or what occurred. For instance, he was very positive that the "Indianapolis" never ran faster than half speed, which he said was eight and a half miles per hour, from west of the bell-buoy to the point of collision (R. p. 211), and that after running under this speed for two or three minutes, she slowed to less than half speed, and never again went faster (R. p. 212). This testimony is directly in conflict with the positive testimony of Captain Penfield that he ran full speed from the bell-buoy into the fog for five minutes, and the testimony of the engineer of the "Indianapolis," that he ran the

engine full speed for at least four minutes during this period; and is also contrary to the conclusive fact that it would be physically impossible for a vessel to cover the distance between the bell-buoy and the point of collision, which it is agreed was at least one and three-quarter nautical miles from the buoy, in seven minutes or less, if she never ran over eight and one-half statute miles per hour.

The evidence of this witness is also shown to have little weight by the fact that he testified that he heard the "Kitsap's" whistles two or three points on the port bow of the "Indianapolis," and then two or three points on the starboard bow (R. pp. 214, 215). But none of the other witnesses claim to have heard these whistles more than one or one and one-half points on either bow. As shown by the witness H. A. Evans, if the "Kitsap" had been two and one-half points on the port bow of the "Indianapolis" at any time, and then later two and one-half points on the starboard bow, the "Indianapolis" at all times maintaining her course within one-sixteenth of a degree, as stated by Captain Penfield (R. p. 146), the "Kitsap" would have had to run over twenty miles per hour to have traveled the distance between these points and reached the

point of collision in the time given by the witnesses (R. p. 362). This, of course, was impossible, as the maximum speed of the "Kitsap" was only fifteen miles per hour.

Witness Percival, for Appellee, also claimed that the "Kitsap" was running very fast (R. p. 251); but his evidence is so contradictory to the other evidence in the case that we think it will have very little weight with the court. He testified that he was standing in the eyes of the "Indianapolis"; that he did not hear any of the bells given on the "Indianapolis" to the engine room at any time, and could only judge of her speed from the feel of the vessel (R. p. 252). He also testified that he thought the engines of the "Indianapolis" were dead for about three minutes before the collision occurred; that she never went ahead during these three minutes (R. p. 254). As shown by witness Evans (R. pp. 362, 363), this was absolutely impossible, as the "Indianapolis" could not have reached the point of collision if her engines had been dead during this time; and, of course, the evidence of Captain Penfield and of the engineer of the "Indianapolis" shows that they were not dead for three minutes. This witness admitted that he thought the "Indi-

anapolis" had some forward motion at the time of the collision, and that in his opinion the "Kitsap" was backing at the time the "Indianapolis" struck her (R. pp. 256, 260). He also stated that the "Indianapolis" backed just before he could see the glimmer of the lights on the "Kitsap" (R. p. 257). It is very apparent that his whole testimony as to the speed of the "Indianapolis" was based on the fact that he did not notice her vibration, while he was standing on her bow looking into the fog, which, of course, he could not do so long as she was running ahead, because she would then have very little vibration, if any, at that point.

In connection with this evidence, we wish to call the court's attention to the following observations of the courts concerning this character of evidence:

"The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation."

The Alexander Folsom, 52 Fed. 403, 411.

"Courts of admiralty are inclined to accept the statements of the crew as to the movements of their

own ship rather than those coming from those on board the other vessel."

The Hope, 4 Fed. 89, 93.

"In cases of collision, where there is great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case."

The Great Republic, 23 Wall 20.

"Superior credit must be given in regard to a vessel's own movements, to the testimony of those on board of her, where it is probable and consistent and not overborne by any decided weight of other testimony."

Carll vs. The Erastus Wiman, 20 Fed. 245, 248.

"In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses, it should be borne in mind: (1) That the testimony of the crew of each vessel, with regard to her course and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements, as they appeared to them."

The Alberta, 23 Fed. 807, 810.

Speaking of the testimony of witnesses on a vessel with reference to the speed of another vessel

colliding with the first vessel, the court used this language:

“The libelant’s witnesses think she did not move back soon enough, and had not conquered her headway when the collision occurred, nor made more than one or two revolutions backward, while her own people say she had not only stopped her headway, but was actually moving back when the collision occurred. Her own officers were in the best position to know this fact, and, other things being equal, their testimony is to prevail over that of observers from the shore or on the Lane and her barges.”

The Cherokee, 15 Fed. 119, 121.

“We are not impressed with the value of the passenger’s testimony (as to the speed of the vessel), although he was an intelligent and candid witness. He was standing at the Delaware’s port bow, leaning upon the rail at the point where it was carried away by the collision, and his attention was attracted by the signals and the bells to reverse.
* * * Manifestly, the witness was speaking from impressions rather than from any tangible, evidential facts. The time for observation consisted of the few seconds, fraught with apprehension and excitement, that intervened between the time he saw the *St. Louis*, 50 or 75 feet away, and the time the vessels came together. * * * The opinion of a nautical man under similar circumstances would be of little probative weight, and that of a non-expert ought not to be entitled to as much.”

The St. Louis, 98 Fed. 750.

“The estimates as to speed given by passengers who are not experts are generally unsatisfactory.”

La Bourgogne, 139 Fed. 433, 443.

Evidence of the respective speed of the vessels in a collision may be deduced from the cut resulting therefrom.

The John I. Brady, 115 Fed. 204.

“The wound itself is the one fact which outweighs all the other evidence. It cannot be argued or explained away.”

The Alberta, *supra*.

The evidence of experts who have examined the injury after a collision was held competent by this court as to the speed of the vessels, in the case of *The Belgian King*, 125 Fed. 869, 876.

“Mere expletive or declamatory words or phrases as descriptive of speed or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real

character of the fact respecting which they are used.”

Foley vs. Boston & M. R. R. Co. (Mass.),
79 N. E. 765.

The only other evidence offered by Appellee with reference to the speed of the “Kitsap,” and also with reference to her course after leaving Pier 4, was the testimony of four witnesses who claimed to have stood on the end of the Colman Dock, and to have seen the “Kitsap” pass that dock. We will discuss this testimony in detail in connection with our argument as to the course taken by the “Kitsap,” as all of these witnesses testified that the vessel they took to be the “Kitsap” was going in a different direction from the point of collision when they saw her.

The trial court found that at the moment of the collision both vessels were moving ahead with considerable momentum, and rejected as untrue all the evidence to the contrary, and stated that “the conclusion is unavoidable that the collision was caused by navigating both vessels at a high rate of speed in a dense fog, and both are equally at fault” (R. p. 423). To reach this conclusion as to the “Kitsap,” the court had to disregard the positive testimony of

the officers of the "Kitsap" as to the bells given and answered, the fact that she was using only one fire, the number of turns her engines were making, and the testimony of all Appellant's witnesses as to the actual speed the vessel was making. It also disregarded the calculations of witness Evans as to the speed the "Kitsap" must have made in order to cover the distance on the course Appellant's witnesses testified the "Kitsap" took, as well as on the course Appell~~ed~~ claims she took, which calculations are easy to verify and have never been disputed. The court must also have disregarded the evidence of speed deducible from the cut made in the "Kitsap," as explained by witness Evans (R. pp. 370-376), and his opinion based thereon. And the court must have based its finding, as to the "Kitsap," solely upon the evidence of the two officers of the "Indianapolis" and her two passengers, who were the only witnesses for Appellee who testified directly as to the "Kitsap's" speed at the time of the collision; although the court disregarded the evidence of these same witnesses as to the speed of the "Indianapolis" herself. The court also disregarded the undisputed evidence that if the "Kitsap" took either course, and ran on that course at

“a high rate of speed,” she would necessarily have been far past the point of collision in the undisputed time of five minutes between leaving her dock and the collision.

The only possible way the court could make this finding as to the “Kitsap” was to accept as true the testimony of the four witnesses who stood on the end of the Colman Dock, to the effect that the “Kitsap” passed south beyond that dock, and therefore ran a longer course than claimed by Appellant, which would require a greater speed than testified to by Appellant’s witnesses; but if her speed was ten or twelve miles, as they testified, she would have passed the point of collision. But at the same time, the court found that the “Ktisap,” after backing, “went ahead curving to starboard, until she came around on her *regular course* headed for Four Mile rock, on the north shore of the harbor” (R. p. 432). The uncontradicted evidence shows that the “regular course” of the “Kitsap” was not south of the Grand Trunk Dock, nor as far south as the point between the Grand Trunk Dock and the Colman Dock, where the court found the point of collision to be. These findings are absolutely inconsistent and are, we think, not only un-

supported by the evidence, but both findings cannot possibly be correct.

We did not think proctor for Appellee will attempt to argue that the evidence supports any finding that the "Kitsap" was running at any greater speed at any time than as testified to by Appellant's witnesses, if the "Kitsap" did run on her "regular course," as found by the trial court. But he will claim that the "Kitsap" did not run her regular course, but went far south of that course, as shown by Claimant's Exhibit 9, and that this course being longer than the "regular course," required her to run faster, and of course, in that event, the court's finding that she "came around on her regular course" could not be correct. We will, therefore, discuss the evidence as to the course of the "Kitsap" on this trip, and the point of collision.

The regular course of the "Kitsap," as testified to by Appellant's witnesses, and not contradicted, is shown on Libellant's Exhibit J, which also shows the course of the "Indianapolis" N.E. by E. $\frac{1}{4}$ E. from the bell-buoy, as testified to by Captain Penfield; and it also shows the course of the steamer "Reliance" on leaving the dock. The regular course of

the "Kitsap," also the course of the "Indianapolis" N.E. by E. $\frac{1}{4}$ E. from the bell-buoy, is shown on Libellant's Exhibit M, and in red, on this exhibit is shown the course the Appellee claims the "Kitsap" took on the trip in question. On Claimant's Exhibit 4 is drawn the *fair weather* course of the "Indianapolis" from the bell-buoy N.E. by E. $\frac{1}{2}$ E., which shows that this course comes south of the Grand Trunk Dock, and by comparison with Libellant's Exhibit M and Claimant's Exhibit 9, shows that such course does not cross the regular course of the "Kitsap." Claimant's Exhibit 4 also shows what Appellee claims was the course of the "Kitsap" at the time in question. This is also clearly shown by Claimant on its Exhibit 9, where it is marked the "ordinary" course of the "Kitsap," also the course it claims the "Kitsap" took at the time in question, and the course of the "Indianapolis." It must be remembered that the course of the "Indianapolis," as shown on this Exhibit 9, is her fair weather course, N.E. by E. $\frac{1}{2}$ E., and not the course N.E. by E. $\frac{1}{4}$ E., which Captain Penfield testified he ran this trip, and which would take him to a point off the north side of Pier 4.

The trial court found the point of collision to

be where the line marked "Course of Kitsap, Dec. 14," crosses the line marked "Course of S. S. Indianapolis" on Claimant's Exhibit 9. But the court also found that the "Kitsap" turned on her "regular course," and the court will see that this regular course does not even touch the line marked "Course of S. S. Indianapolis," nor come within one hundred feet of the point of collision, as found by the trial court. It cannot be claimed that the "Indianapolis" was in fact on the northerly course, and that the collision occurred where the line marked "Course of Kitsap, Dec. 14," would cross that course, because such a point would not be between the Grand Trunk Dock and the Colman Dock.

The trial court must have entirely disregarded the testimony of Captain Penfield as to his departure from the bell-buoy at this time that his course was N.E. by E. $\frac{1}{4}$ E. from the bell-buoy, and all the evidence of Appellant's witnesses as to the course of the "Kitsap," and where they heard the collision; and the court must have intended to find the point of collision as indicated on Claimant's Exhibit 9, although such a finding is inconsistent with his finding that the "Kitsap" turned on her regular course. We think the evidence fully sustains our

contention that the "Kitsap" did turn on her regular course at this time, not on the course marked "Course of Kitsap, Dec. 14," on Claimant's Exhibit 9; and if we are correct in this, it is a matter of absolute certainty, demonstrable by mathematical calculation, that the collision took place north of where the court found it to be, and that the "Kitsap" could not have been running at a high rate of speed, or any speed in excess of that testified to by Appellant's witnesses, because such a speed would have placed her far past such a point at 4:39½ or 4:40.

The only witnesses on behalf of Appellee who testified as to the course of the "Kitsap" at this time, or at any other time, were the four witnesses who claimed to have stood on the end of the Colman Dock.

The first of these witnesses was Frank Burns, general manager of Appellee Company. He testified that he saw the "Kitsap" pass the Colman Dock, headed south right across the end of the dock, at right angles, and about one hundred feet away, running ten or twelve miles per hour (R. pp. 181, 182, 186). He testified that, in his opinion, it was 4:42 or 4:43 that he saw the "Kitsap;" that

it was two or three minutes after the "Indianapolis" was due in at that dock, and that she was due at 4:40 (R. p. 186). He said that he saw the "Kitsap" about one hundred to one hundred and twenty-five feet away (R. p. 186); that he did not see her name (R. p. 192); that she was in sight for about a minute; that she did not appear to be turning (R. p. 186), but that she appeared to be running at this speed down the face of the dock to the south, and that about *three minutes later* he heard the danger signals off the end of the Colman Dock (R. p. 187). While the witness was ready to state positively that it was the "Kitsap" which he saw, without seeing her name, and, although he admitted that it was foggy, so that he could see only a dim light on the Grand Trunk Dock some of the time (R. p. 186), we do not think this evidence will have any weight with the court. In the first place, he fixes the time positively as after the time the collision had actually occurred; and in the next place, he fixes the collision some *six minutes* after all the other witnesses agree that it occurred; again he says that the vessel which he saw was running at right angles along the front of the dock, and it did not appear to be turning. If it was the "Kitsap"

it was necessary that she make a turn after she had passed out of sight of this witness, and would place the collision long after it actually occurred. It must, therefore, be true that if the witness saw any vessel passing the dock at all, it was not the "Kitsap" but some other vessel.

We would call the court's attention especially to the evidence of witness Evans concerning this testimony of Mr. Burns (R. p. 357).

Witness Brydesen, who testified that he was standing on the end of the Colman Dock with Mr. Burns at this time, also claimed to have seen the "Kitsap" go by. He fixes the time as 4:40 or 4:45, by the Colman Dock time, which was Western Union time, and the same time as that used by the "Indianapolis" (R. p. 202). He was positive that it was at least 4:40; that it was after the time the "Indianapolis" was due, and that she was due at 4:40; he did not see the name of the vessel that passed (R. p. 203); he says he saw the ship some one hundred or one hundred and fifty feet out from the end of the dock (R. p. 197); but says that the fog was heavy one minute and the next minute could see one hundred feet or farther (R. p. 196). He must therefore have seen this vessel at the ex-

treme range of vision in the fog. He says that she was broadside to the end of the dock, headed at right angles to the dock, but was rounding slow (R. pp. 200, 201); that she was going ten miles or better (R. pp. 197, 201). He says he saw the outline of the boat (R. p. 203), and also admitted that it was extremely "thick weather" (R. p. 205). He testified that he was dispatcher of boats at the Colman Dock, that he knew their courses and also the ordinary course of the "Kitsap," and the "Kitsap's" ordinary course went "up to the Grand Trunk Dock," "she is just off the Grand Trunk Dock when she makes the turn" (R. pp. 201, 202). He did not hear the danger whistles, although he stood beside Mr. Burns who claims to have heard them, only a short distance away (R. p. 199). What we have said with reference to the testimony of the witness Burns applies to the testimony of this witness. It is impossible that the vessel he saw, if any, could have been the "Kitsap," as, according to all the evidence, she was not in this vicinity at this time, but was sinking after her collision somewhere north of the Colman Dock. We also call the court's attention to the testimony of the witness

Evans relative to this testimony of the witness Brydesen (R. pp. 357, 358).

Witness Tucker, a former employee of Appellee, was the third witness standing on the end of the Colman Dock. He testified that he saw the "Kitsap" go by. He did not remember the exact time, but said that the "Indianapolis" was due (R. pp. 222, 227, 228). He admitted that the fog was thick for an instant, but claimed that a wave would come which would thin it, so you could see two hundred feet (R. p. 221). The vessel he saw was traveling at a right angle to the end of the dock, but he says she was swinging a little (R. pp. 222, 225). He also gives her speed at approximately twelve miles an hour, and says that he saw her from one hundred and twenty-five to one hundred and fifty feet off the end of the dock. He did not see the name of the vessel, but could see her windows and a "dim outline" of the boat (R. p. 226). He heard the danger whistles not over five minutes after he heard the "Kitsap" leave the dock (R. p. 225). As we have shown, of course, this boat could not have been the "Kitsap."

The other of these four witnesses was the witness Gleason, another employee of the Appellee

Company, who also says that he was standing at the end of the dock at this time, and saw the "Kitsap" one hundred feet or more away; that she was traveling fast, about ten or twelve miles an hour (R. pp. 230, 231). He says the ship was going south, but swinging to starboard out into the bay (R. p. 230). He also fixes the time at from 4:40 to 4:45 (R. p. 231). He claims to have seen the ship for a minute (R. p. 231); that he last saw her one hundred feet south of the Colman Dock (R. p. 252). He did not see her name, nor see any lights on her, although the evidence is that the lights of the "Kitsap" were all burning (R. pp. 36, 307). There would seem to us to be no doubt that if this witness saw any vessel passing the dock, it was not the "Kitsap."

We think the evidence of witness H. A. Evans, with reference to the testimony of these witnesses, shows conclusively that they were mistaken when they testified that they saw the "Kitsap." Nor can it be claimed that they were mistaken as to the time when they claim to have seen this vessel passing the Colman Dock, because they all fix it so definitely. However, the testimony of the witnesses produced by appellant in its rebuttal, who saw the

“Kitsap” leave and make the turn from in front of Pier 5, and who stated positively that she never went south of the Grand Trunk Dock and, therefore, could not have been in front of the Colman Dock, nor within sight of witnesses standing at the end of the Colman Dock, as well as the testimony of the officers of the “Kitsap” as to her course at this time, will satisfy the court that these witnesses for Appellee were mistaken as to the vessel they saw, or that they did not see any such vessel, and that the “Kitsap” never did pass the dock. Certainly their evidence alone should not be sufficient to overcome the testimony of Appellant’s witnesses on this question.

Lieutenant Stewart of the United States Navy, stationed at Bremerton, from 4:30 o’clock on this day stood on the extreme stern of the steamship “Kennedy,” then lying on the outer face of the Colman Dock, with her stern much farther out than the balcony where these four witnesses stood. The leaving time of the “Kennedy” was 4:40. He was in a position to see any vessel passing that dock much better than the four witnesses above referred to. He states positively that he did not see any vessel pass by the dock before he heard the distress

signals from the "Kitsap" and "Indianapolis" at a point north of where he stood (R. pp. 298-300).

It is not disputed that the "Reliance" lay at the end of Pier 4 at the time the "Kitsap" backed out from the south side of this pier, and that the "Reliance" left the dock, turning to her course for the bell-buoy just about as the "Kitsap" came ahead after backing in front of Pier 5. The evidence of Captain Wallace, then the first mate of the "Reliance," and the testimony of several passengers on board of her, is positive that the "Kitsap" never went south of the "Reliance," but at all times was on her starboard side; that the "Reliance" made her usual turn to her course to the bell-buoy, which ordinarily would not have, and in this case did not carry her south of the Grand Trunk Dock. Captain Wallace saw the "Kitsap" leave, back around the "Reliance" and go ahead, swinging to starboard out into the bay (R. p. 328). The "Reliance" left just as the "Kitsap" was steaming ahead. She gave a kick back and turned to starboard, the "Kitsap" always remaining on her starboard side (R. pp. 328, 330). The "Kitsap" kept turning to starboard until she was headed northerly toward Four Mile Rock (R. p. 329). The regular

course of the "Reliance" never took her south of the Grand Trunk Dock, and she did not go south of that dock at this time, and the "Kitsap" was north of her all the time (R. pp. 329, 330). He heard the danger whistles of the two vessels north of the "Reliance" (R. pp. 330, 332).

Witness Jackson, a passenger on the "Reliance," testified that the "Reliance" made a course following the "Kitsap," taking her usual course; that the "Kitsap" never went south of the "Reliance," but kept turning to starboard until she went out of sight, showing her stern light (R. pp. 301-303, 307). He did not notice any difference in the course of the "Reliance" at this time from her ordinary course, with which he was familiar, as he had been riding on the "Reliance" daily for some time.

Mr. Gazzam was a passenger on the "Reliance." He testified that he stood forward of the pilot-house and saw the "Kitsap" leave and swing; that she never went south of the "Reliance," and that the "Reliance" made her usual turn, never going south of the Grand Trunk Dock. He also heard the whistles of the "Kitsap" to the north of the "Reliance" (R. pp. 337, 342).

Witness Shaw was a passenger on the "Reliance" and saw the "Kitsap" leave and turn out of sight, remaining always to the north of the "Reliance" (R. pp. 319, 321). He says he could see the fireboat lying at the City Dock between the Grand Trunk Dock and Pier 3, which was the next pier south of Pier 4, and testified that the "Reliance" did not go south of the Grand Trunk Dock (R. pp. 320, 322, 326).

Harbormaster Hill testified that he was in his office in the tower on the outer corner of the Grand Trunk Dock toward Pier 4, and saw the "Kitsap" make the turn, and that she did not go south of the Grand Trunk Dock; he heard the crash of the collision two and one-half points off the Grand Trunk Dock to the northwest (R. pp. 405, 407, 410).

Witness Kurin, wharfinger on Pier 4, testified that he stood at the end of Pier 4 and heard the danger whistles of both boats to his right while he was facing the bay, as he showed on Libellant's Exhibit K (R. pp. 309-11).

Witness McDonald also stood on the end of Pier 4, and heard the danger whistles to his right (R. pp. 335, 336).

Witness F. L. Evans, wharfinger on Pier 6, was on the end of that dock, which was the second pier north of Pier 4. He testified that he heard the crash of the collision, the breaking of glass and the voices, which appeared to him six hundred to eight hundred feet south or west of where he stood, as he indicated on Libellant's Exhibit L (R. pp. 312-313).

Besides these witnesses, there is the testimony of the officers and crew of the "Kitsap" as to her ordinary course, and her course on this trip. Captain Hanson testified that he put the helm hard aport when the "Kitsap" came ahead after backing in front of Pier 5, just as he usually did; that coming ahead at slow speed under this helm the "Kitsap" would go to the north corner of the Grand Trunk Dock, and that she never went south of the Grand Trunk Dock (R. pp. 29, 30); that at this time the "Kitsap" came around on her usual course W. by S. $1\frac{1}{4}$ S. for Four Mile Rock (R. pp. 30-31); that the tide was running northerly in the direction of his course for Four Mile Rock about one mile an hour (R. pp. 35-36), and that the "Kitsap" was north of Pier 4 at the time of the collision (R. p. 36).

Mate Welfare testified that in making her usual course the "Kitsap" never went south of the Grand Trunk Dock, and that when the "Kitsap" went ahead her helm was hard aport (R. pp. 66, 67, 68, 77).

Lookout Tongerose testified that the "Kitsap" went ahead "swinging all the time" (R. p. 79), and that she usually went "just about to the Grand Trunk Dock," never south of it (R. p. 80).

It would seem to us that this testimony should be sufficient to satisfy the court that the "Kitsap," on the trip in question, never went far enough south to turn and pass the point the trial court found the collision occurred. It certainly should be sufficient to overcome the vague, contradictory and improbable statements of the four witnesses for Appellee, who stood on the end of the Colman Dock, and who might be easily mistaken, especially in view of their interest in this suit.

There is no evidence that either the "Kitsap" or the "Reliance," on leaving Pier 4 and turning on their respective courses, ordinarily ever went south of the Grand Trunk Dock. Certainly if they had ever gone south of that dock in making this turn, Appellee would have been able to secure some

evidence of this fact. On the other hand, Appellee introduced a drawing (Claimant's Exhibit 9), showing the ordinary course of the "Kitsap" as testified to by Appellant's witnesses. No reason has been or can be given or suggested why either the "Kitsap" or the "Reliance," on leaving this pier at this time to turn to their ordinary courses, should have gone farther south than they usually did, or than they would naturally be carried in making this turn. In fact, there is every reason to suppose that they would not go as far south at this time as they would ordinarily in clear weather, for the reason that they would naturally at this time go more slowly than in clear weather, and the more slowly they went, especially with the tide running northward, the shorter would be their turn, and the less likely that they would go south of their ordinary courses.

Neither of these vessels could have gone south of the Grand Trunk Dock, and especially not south of the Colman Dock, as testified to by Appellee's four witnesses, if their helms had been hard aport, as testified to. In fact, the "Kitsap" would have had to run some eight or nine hundred feet nearly straight, after coming ahead, before turning, and have passed across the course of the "Reliance" and

close across the end of the Grand Trunk Dock, if the testimony of these four witnesses is correct that they saw her from one hundred to one hundred and fifty feet off the Colman Dock. This clearly appears from the drawing introduced by Appellee as Claimant's Exhibit 9. But the "Kitsap" did not go there. The testimony of Lieutenant Stewart and all the evidence of disinterested witnesses, as well as all the circumstances in the case, fully corroborate the testimony of the officers of the "Kitsap" and the "Reliance" in this respect.

We feel that the court will be satisfied beyond a doubt that the "Kitsap," at this time, left Pier 4 and turned to her course in the ordinary way, never going south of the Grand Trunk Dock, and never crossing the course which the evidence shows the "Indianapolis" usually took to reach the Colman Dock, and the course which she should have taken at this time. We also think the court will be fully satisfied from the evidence, that the "Kitsap" never went faster than four or five miles an hour. If she took her ordinary course and left at the time it is undisputed that she did leave, and the collision occurred at 4:40, as all agree, it is a matter of mathematical calculation as to what speed she made dur-

ing this time between these points. The only theory upon which Appellee could claim the "Kitsap" made greater speed than is claimed by Appellant's witnesses, is to claim that she went farther south, and that her course between the point of departure at Pier 5 and the point of collision was a longer course, and that they had to travel faster in order to cover this distance in this time. But Appellee's evidence to establish this fact, as we have shown, is so inconsistent, so vague and improbable, even to the extent of impossibility, that we certainly do not think the court will feel that this evidence outweighs the positive testimony of Appellant's witnesses as to the course the "Kitsap" actually took at this time. Even if their testimony as to her course is correct, and that she was running ten or twelve miles on the course shown on Claimant's Exhibit 9, she would have passed either course of the "Indianapolis" before 4:40, as the court can easily prove.

If we are correct as to the course taken by the "Kitsap," then her speed is established by the mathematical calculations and the positive testimony of the officers and crew and passengers on the "Kitsap," to have been very slow, not to exceed at

any time five miles per hour. This speed cannot be claimed to be excessive on the part of the "Kitsap." Her maximum speed was fourteen or fifteen miles an hour; a speed of four or five miles per hour would give her little more than good steerage way, and would certainly leave her under complete control at all times. This was all that was required of her.

If we are correct as to the speed and course of the "Kitsap," then there was no fault on her part unless it occurred after she heard the "Indianapolis' " fog signals. We will therefore consider the evidence on this question.

When the "Kitsap" left the dock at this time, her master was in the pilot-house in charge of the wheel (R. p. 31). Her mate was first on her stern until she had ceased to back and came forward turning on her course, when he came forward of the pilot-house and stood there as an additional lookout while leaving the harbor. There were two look-outs on the bow, one on her extreme bow, a man of experience, and the other, also experienced, stood on the main passenger deck, just forward of the pilot-house (R. pp. 68-69). All passengers were back of the pilot-house (R. p. 82), and the windows

were open (R. p. 44). There was nothing to obstruct the vision or hearing of any of these officers. The "Kitsap" was sounding her fog signals regularly; her engineer was in the engine room in charge of the engines; she was proceeding slowly, and all her lights were burning (R. p. 36). No whistles from the "Indianapolis" were heard until the "Kitsap" had turned to her course toward Four Mile Rock. The captain, mate, both lookout men and witness Foster all testified positively to this (R. pp. 30, 31, 48, 49, 70, 80, 87, 93, 121). No whistle from the "Indianapolis" was ever heard on the starboard bow of the "Kitsap," nor while she was turning (R. pp. 31, 49, 80, 93, 131). In fact, the "Indianapolis" was too far from the "Kitsap" while the "Kitsap" was turning to hear her whistles; and as the "Indianapolis" did not hear the "Kitsap" until 4:38 (R. pp. 155, 177), the "Kitsap" could not have heard her whistles before that time. The "Kitsap" went ahead at 4:36; the "Indianapolis" was then one and one-quarter statute miles away; two minutes later, when the "Kitsap" had nearly completed her turn so that the "Indianapolis" was on her port side, the "Indianapolis" was still one-quarter of a statute mile

from the dock, and although the "Kitsap" had in the meantime gone away from the dock, there was certainly no time intervening while the "Indianapolis" was on the port side of the "Kitsap," that the "Indianapolis" was near enough to be heard, even if she happened to blow her whistles at just the right time to be heard before the "Kitsap" had turned. After the "Kitsap" had turned, and the "Indianapolis" had come near enough to be heard, her whistle was heard three or four points off the port bow. Both captain and mate knew that it was the "Indianapolis" (R. pp. 31, 70, 77). They knew they were on their own course (R. pp. 31, 47, 51, 69, 77), and that the course of the "Indianapolis," if she was on her regular course, as they had a right to assume at that time, would not cross their course, and there was no danger of a collision (R. pp. 39, 46, 53, 54, 55, 57). They were just leaving the docks of a large city in a heavy fog, where vessels were coming and going at all times; they had no reason to stop when they heard the first whistle of the "Indianapolis," and, in fact, it would have been extremely dangerous, both to themselves and other vessels, for them to do so and lose control of their vessel, unless the danger was so

imminent as to absolutely require it; but there was no apparent danger at this time. With the tide running, the "Indianapolis" coming in on a course which ordinarily would take her astern of the "Kitsap," the "Reliance" leaving on a course astern of the "Kitsap," the "Telegraph" coming in, and other vessels coming and going, or liable to come and go at any moment, it certainly would have been gross negligence under the circumstances, as shown by this evidence, for the "Kitsap" to have stopped when she heard the first whistle from the "Indianapolis." In no sense can it be claimed that Rule XVI of the Rules of the Road required her to stop at this time. The vessel they heard was known to them; her position was ascertained; she was a vessel having a daily regular run to and from the harbor; her regular course would amply clear them, and they had a right to assume that she was on that course until it later developed that she was not. Neither would the circumstances permit the "Kitsap" to stop in front of the docks under these conditions, until the danger of a collision with the "Indianapolis" was imminent.

Further, the "Kitsap" had the right of way under Rule XIX, as she was on the starboard bow

of the "Indianapolis," and by Rule XXI the "Kitsap" was required to keep her course and speed. She was sounding frequent fog signals which were heard on the "Indianapolis," and she had a right to assume at this time that the "Indianapolis" would obey the rules and keep out of her way. Further, she was proceeding very slowly, and was under complete control sufficient to enable her to be stopped before she could collide with any other vessel after seeing her, if the other vessel did not run into her. Under these circumstances, the "Kitsap" proceeded slowly, but eased off a little to starboard away from the "Indianapolis" (R. p. 77). A few seconds later they heard another whistle and then a third, and the captain of the "Kitsap" then immediately gave a bell to stop the engine (R. pp. 32, 49, 61, 62, 70, 87, 91, 96, 103); then almost immediately after he gave two bells and a jingle, the signal for full speed astern, all of which bells were immediately answered.

The "Kitsap," under these bells, came to a stop. This is shown by the evidence of Captain Hanson (R. pp. 33, 36, 37); by the evidence of Engineer Hanson, who says he answered the bells by opening the engine wide open (R. p. 62); by the

evidence of the mate, who says she would stop under these circumstances in fifteen or twenty seconds (R. pp. 71, 72); by the evidence of lookout Tongerose, who says she "was making astern" when struck (R. p. 81); by the evidence of Foster, who felt her shaking under the backing bells (R. p. 91), and says she was "dead still" (R. p. 92), which he knows because he looked at the water and could tell (R. p. 95); by the evidence of the fireman, who stood at a port near the engine, heard the bells, saw them answered, felt the shaking, and saw the white foam from her wheel (R. p. 103).

Besides this evidence is the testimony of the witness Evans, an expert of exceptional qualifications, that from a careful examination of the cut of the "Kitsap," in his opinion she had "practically no movement in the water along the line of her keel at the instant of collision" (R. pp. 370-379). We would respectfully call the attention of the court particularly to this evidence of Mr. Evans, which, because of his ability as an expert, the care with which he examined the question, preparing drawings and illustrations to make his evidence clear, and his entire want of any bias or interest in

the case, we believe entitles this evidence to great weight.

In the face of all this evidence, and in view of the authorities we have heretofore cited, as well as the well-known rules of law and common sense to be used in weighing testimony, we fail to see how the court can take the evidence of four witnesses on the "Indianapolis" as to the "Kitsap's" speed or motion at the time of the collision, to support a finding that she was then "moving ahead with considerable momentum," or at all. Especially should this be true when one of these very witnesses for Appellee admitted that in his opinion the "Kitsap" was backing at the time of the collision (R. pp. 256, 260). In fact, we believe the evidence, if carefully considered and weighed, will leave little doubt in the court's mind that the "Kitsap" was handled at all times with the greatest care and caution; that she complied strictly with the rules of navigation; that she kept her slow speed and course as she was bound to do, and was at all times under such control that she could be stopped before she would collide with the "Indianapolis," after seeing her, if the "Indianapolis" did not run into her, and that

if the "Indianapolis" had been under the same control no collision would have occurred.

It may be argued that because the "Indianapolis'" whistles were heard in the same general direction from the "Kitsap," they indicated danger. Of course, this argument could not apply to the first whistle, nor to the second; and after hearing the third whistle, she stopped, then backed at full speed and came to a standstill. Certainly nothing more could be done or was required. But we do not think three whistles from the same general direction in themselves indicate danger, especially when coming from a known vessel, having a known course clear of the course of the vessel hearing them; nor should such an argument have much weight under the evidence in this case as to the gross fault of the "Indianapolis" and the careful handling of the "Kitsap"; nor should it be sufficient to warrant a finding of mutual fault and a decree dividing the damages.

Appellee will probably claim that the "Kitsap" crossed the course of the "Indianapolis" twice, and was therefore negligent. The testimony of the various witnesses in behalf of the Appellee that they heard the whistles of the "Kitsap" first on the port

bow, and then on the starboard bow, we think is entitled to very little weight. In the first place, as stated by numerous witnesses for both parties, there were a great many whistles sounding at this time in the harbor, and no one could be positive that the whistles he heard on the port bow of the "Indianapolis" were those of the "Kitsap"; and the fact that one witness (Jacobs) said that he heard these whistles two to two and one-half points off the port bow, while other witnesses say they heard the whistles not more than one point off the port bow, shows that they had reference to different whistles. It is admitted that the "Telegraph" came in from West Point at this time, and her whistles were on the port side of the "Indianapolis."

Further, as already shown, the "Indianapolis" did not hear the "Kitsap's" whistles until 4:38, two minutes before the collision (R. pp. 155, 177). If these whistles were on the port side of the "Indianapolis" at all, the "Kitsap" was then *north* of the Grand Trunk Dock at least, and she could not possibly pass to the starboard of the "Indianapolis" and turn and reach any point on any course of the "Indianapolis" in the two minutes before the collision. The court need only to measure on Claim-

ant's Exhibit 9 the distance necessary to travel in these two minutes from a point to port of the "Indianapolis" to her starboard and to a point on her course, and see the speed required to make that distance in two minutes, to see that this statement is true.

However, the conclusive answer is that if the "Indianapolis" was on the course N.E. by E. $\frac{1}{4}$ E., magnetic, as testified to by Captain Penfield, and the "Kitsap" backed in front of Pier 5, as all the evidence shows she did, she never could have been more than *two degrees* on the port bow of the "Indianapolis," which is only a trifle over *one-sixth of one point*; and she was at this point at 4:36, when the "Indianapolis" was only three minutes from the bell-buoy, and one and one-quarter miles from the "Kitsap," so far away that it was impossible to hear the whistles from the "Kitsap" on the "Indianapolis" (R. pp. 356, 357).

If proctor would claim that the true course of the "Indianapolis" at this time was not N.E. by E. $\frac{1}{4}$ E., magnetic, but this was the compass course, and the course was in fact N.E. by E. $\frac{1}{2}$ E., magnetic, still the "Kitsap" at Pier 5 could have been only a fraction of a point on the port bow of the "Indi-

anapolis," and then at a time when the "Indianapolis" was about a mile and a quarter away, too far to hear her whistles. Again, if this latter course is the correct course, then the "Kitsap" could not have been even one point on the starboard bow of the "Indianapolis." Even if the testimony of the witnesses who stood on the end of the Colman Dock were true, and the "Kitsap" went as far south as they claim she did, she never was one point on the starboard bow of the "Indianapolis," no matter which course the "Indianapolis" was on. The court will readily see this is correct by drawing this course on the chart, and locating one point ($11\frac{1}{4}$ degrees) north or south of it.

We would respectfully call the attention of the court to the testimony of witness H. A. Evans on this subject, which can be easily verified (R. pp. 355-357, 362).

Proctor will undoubtedly argue that the place where the "Kitsap" was found disproves our contention as to the location of the collision and the course of the two vessels. However, there is a simple but complete answer to this.

It is true that "Kitsap" was found near the

fair weather course of the "Indianapolis," on a line between the Colman and Grand Trunk Docks, and a short distance off the end of those docks. But this conclusively proves that she was *not struck* at this point, as she did not sink below the surface of the water until some twenty minutes after the collision. When struck, the "Kitsap" was headed toward Four Mile Rock in a westerly or northwesterly direction, and the "Indianapolis" was headed toward the docks. The "Indianapolis" backed away and then came back to the "Kitsap" holding against her bow, part of the time with lines on the "Kitsap," the engines of the "Indianapolis" moving ahead slow, and her helm hard aport (R. pp. 164, 165). When the "Indianapolis" let go the "Kitsap," and she sank, both vessels had turned *half round*, the "Indianapolis" heading away from the docks (R. pp. 169, 170-172), and the "Kitsap" heading in an easterly direction (R. pp. 171, 172), and when found by the salvors her bow was pointing toward the East Waterway (R. p. 316).

The answer to such a contention on the part of the Appellee is therefore very plain. The "Indianapolis" going ahead with helm hard aport turned herself and the "Kitsap" in a circle southward un-

til the "Kitsap" sank where she was afterwards found. Captain Penfield, in answer to proctor's questions, claimed that the "Indianapolis" would hardly move herself or the "Kitsap" by doing this, and sought to leave the impression that the two vessels swung around as on a pivot. This, of course, could not be true. The "Indianapolis" could not turn herself alone in the water on a pivot, and the "Kitsap," a much lighter vessel, would not offer sufficient resistance laid alongside, to act as a pivot in the water, even with the tide running against them one mile an hour. The court has seen tugs turn barges and vessels and knows that they make a considerable circle, its size depending, of course, on various conditions, such as tide, wind, size of barge or vessel, size of the tug and the speed of her engines, but this resistance of a vessel against a small tug turning her would not be sufficient to make them turn on a pivot, but they would describe a considerable circle.

Captain Penfield claimed the "Indianapolis" would turn as if she was working tied at a dock (R. p. 172), but the court knows that in such case she would not turn at all, but merely hold steady, while in this case she actually turned around; in

fact, she could not go ahead with sufficient speed to turn herself and the "Kitsap" without moving in a circle to starboard, her helm being hard aport. It follows, therefore, that Mr. Evans was correct in his opinion that the vessels did describe a partial circle southward at the end of which the "Kitsap" was let go, and sank at the place where she was afterwards found (R. pp. 381, 382, 397, 398).

Mr. Evans could not give the exact length of the arc of this circle, not knowing exactly the various conditions affecting it, but he gave his opinion that this arc was as shown on Appellant's Exhibit J. We believe this is substantially correct, as shown by all the evidence. But in any event, the "Kitsap" must have been *struck* considerably *north* of the place she was found, and, therefore, north of the proper course of the "Indianapolis," and north of the place the trial court found the point of collision to be. She was not struck south of the point where she was found, because no one claims that the "Indianapolis" was ever south of that line. She could not have been struck at the point where she was found, because if the effect of the "Indianapolis" going ahead pushing against the "Kitsap" was merely to turn her round, the tide in the twenty

minutes between the collision and the sinking of the "Kitsap," running at the rate of one mile an hour, would have carried both vessels one-third of a mile north; therefore, she could not have been struck at this point.

Proctor will undoubtedly refer to the testimony of Captain Hanson and Engineer Hanson to the effect that the speed of the "Kitsap" was increased while she was turning. Captain Hanson testified that he told the engineer to go "a little stronger" because she handled slow (R. p. 50); and Engineer Hanson says he gave the engine five more turns, that is, sixty-five instead of sixty, her full speed being one hundred and eighty turns (R. p. 61). This was before the "Indianapolis" was heard, and certainly it was not then improper to run sixty-five turns instead of sixty, which was only a little over one-third her full turns. But we wish to call the court's attention to this testimony, to show the fairness of these witnesses as compared with the testimony of Captain Penfield. It appears that Engineer Hanson did not remember receiving this order at the time he testified before the government inspectors, but on talking later with the captain he recollected it, and freely testified to the fact before

the commissioner in this case (R. p. 65). If there had been the slightest disposition on the part of these officers to color their evidence or hide anything or be untruthful, the engineer would have convinced the captain that the order was not given, and they would have so testified, instead of the other way.

Proctor will probably argue that the "Kitsap" only acquired the right of way under Article XIX of the Rules of the Road by deliberately turning a half circle in front of the known course of the "Indianapolis." As we have shown, and as appears from the great preponderance of the evidence, the course of the "Kitsap" never at any time crossed or touched the known course of the "Indianapolis." That course in fair weather was to a point about one-quarter of a mile off shore, and south of the south line of the Grand Trunk Dock, and at that point she turned south to go along the angling face of the Colman Dock. The regular course of the "Kitsap" never touched this course, and would not even touch the line of this course projected to shore (Claimant's Exhibit 9). According to all of Appellant's evidence, the course of the "Kitsap" on this occasion did not cross or touch

this course or a projection thereof. However, as the "Indianapolis" was in fact on a course several hundred feet northerly of her regular course, the "Kitsap," when she was at Pier 5 at 4:36, was about in line with that course projected to shore. But the "Indianapolis" was then only three-quarters of a mile from the bell-buoy, and a mile and a quarter from the "Kitsap," too far for either vessel to hear the other. The "Indianapolis" did not hear the "Kitsap" at 4:36 nor until 4:38, after the "Kitsap" must have been on the starboard bow of the "Indianapolis," and the "Kitsap" did not hear the "Indianapolis" until she was in fact on the starboard bow of the "Indianapolis," and then heard her on her own port side. Whether or not the "Indianapolis" knew it was the "Kitsap" which she heard is immaterial, she did ~~not~~ know that a vessel was coming out of the harbor on her starboard bow, and it was her duty, especially in a heavy fog, and as she was off her regular course, to keep out of the way of that vessel. It was certainly no fault of the "Kitsap" to make the turn she did under these circumstances, and after making the turn and hearing the "Indianapolis'" whistles, she was bound, under the rules, to keep her course

and speed until danger was imminent, and had a right to assume the "Indianapolis" would obey the rules and pass astern.

We wish briefly to call the court's attention to the witnesses for the respective parties in this case. Of course, the principal witness for Appellee is Captain Penfield, master of the "Indianapolis." We do not think much need be said about his evidence, as it so clearly appears that he tried in every way in his testimony to shield himself; repeatedly contradicting himself on different points, and contradicting other evidence offered in behalf of Appellee; and also tried to show some fault on the part of the "Kitsap," so that the liability of the "Indianapolis" for damages might be divided. Mate Anderson was also an interested witness, but he knew very little about the facts of the case. It does not appear that there was any look-out on the "Indianapolis," although the cross-libel alleges that fact, and no other officer or member of the crew of the "Indianapolis," except the engineer in charge, testified in the case. It is certainly remarkable that the quartermaster at the wheel, who knew what signals were given by the captain at his side, and what course was steered, was not called to testify; and

certainly if there had been a look-out on the "Indianapolis," who would have been in a better position to see the action of the "Kitsap" than anyone else on the "Indianapolis," he would have been called as a witness in this case, or his absence explained.

Witnesses Frank Burns, Charles Brydesen, J. E. Gleason and J. R. Tucker, all employees or ex-employees of the Appellant Company, clearly show their bias, and their testimony is so improbable, and against all of the other evidence in the case, that it certainly can have very little weight.

Witness B. F. Jacobs, a Tacoma lawyer, even though he was commodore of the Tacoma Yacht Club, showed remarkable ignorance concerning the speed of the "Indianapolis"; and we think that neither his testimony nor the testimony of the witness Percival will have very much weight with the court, because so clearly against facts in the case testified to by other witnesses on behalf of Appellee. Engineer Thorn merely gave the bells which he received and answered, and his evidence on this point corroborates our claim as to the speed of the "Indianapolis."

As to the evidence of witness Frank Walker, we think the way he tried to avoid answering clear

questions put to him on cross-examination, and his evident bias in the case, and his willingness to give his professional opinion that the "Kitsap" "impaled" herself on the bow of the "Indianapolis," without giving the slightest reason for such opinion, all show that his evidence is entitled to little weight. He admits that he had been doing all the surveying of vessels for the Appellee Company, and we think it appears very clearly from his manner of testifying that he was laboring hard to try to bolster up what he knew was a weak case, in order to help show some fault on the part of the "Kitsap," which might result in a division of damages. We would call the court's attention especially to the evidence of witness H. A. Evans relative to the claim that the "Kitsap" "impaled" herself on the bow of the "Indianapolis" (R. pp. 378-380), although, as stated in the case heretofore quoted from, such a proposition ought not to be advanced before an intelligent court.

The witnesses we have referred to above are the only witnesses who testified in behalf of the Appellee as to any matters concerning the course, speed, handling or fault of the "Kitsap."

Opposed to these witnesses we have the evi-

dence of Captain Hanson, who testified frankly, and who is corroborated in almost every particular by the evidence of the mate, the two look-out men, the engineer and the fireman of the "Kitsap." We also have the engineer, who was fair enough to admit that he was mistaken in his testimony before the Inspectors, and that he did receive an order to go a little faster, and whose evidence as to how the engines were run is fully corroborated by the fireman who was in the engine room with him. We have the testimony of the two look-out men, which is clear, frank, and corroborated by the other evidence; and we have the evidence of the fireman, who corroborates the engineer and other witnesses. Certainly the evidence of these witnesses, instead of being wholly disregarded, as it was by the trial court, is entitled to great weight, not only under the well-settled rules of law heretofore referred to, but also because this evidence is reasonable, consistent, and corroborated by other unimpeached testimony, as well as by circumstances and admitted facts. We cannot understand why the trial court should have disregarded this evidence and based a finding solely upon evidence of witnesses which, under the well-recognized rules of law, is entitled

to little weight, even if it was consistent and probable, but which is in fact inconsistent, vague and improbable, some of it, as we have shown, absolutely impossible, especially when at the same time the Court disregarded the testimony of those same witnesses as to the speed of their own vessel.

Besides these members of the crew, we have the testimony of witnesses absolutely without any interest in the case, and all, so far as their evidence covers the same points, corroborating each other. We have the testimony of witness Foster, a passenger on the "Kitsap;" also of Mr. Jackson, a business man of Seattle; also of Mr. Gilbert, a passenger on the "Indianapolis" who had no interest whatever in the case; also the evidence of Mr. Weld, a man of considerable experience on steam vessels, who was also a passenger on the "Indianapolis," and had no possible interest in the outcome of the case; we have the evidence of Lieutenant Stewart, who stood on the stern of the "Kennedy," and who knew in what direction the sounds of the collision were, and who could not be accused of having the slightest interest or bias in the case. Captain Hill, Harbormaster of Seattle, also testified for Appellant, and we believe his evidence will have great

weight with the court, as he certainly had no interest. The witnesses who stood at the end of Piers 4 and 6, and heard the collision, had no interest in the case, and their testimony was clear, and we believe convincing. The evidence of Captain Wallace, then first mate of the "Reliance," was fair and corroborated by a great deal of the other evidence in the case. Captain Wood of the West Seattle Ferry, corroborated the evidence of Appellant's witnesses as to the density of the fog, and directly contradicted Captain Penfield and Appellee's witnesses that the fog was raising and lowering or in waves. Mr. Shaw, a rancher and a passenger on the "Reliance," had no interest in the case, and his testimony is very positive as to the course of the "Kitsap" and the "Reliance," and where he heard the collision and Captain Hanson's voice.

Of course, it will be argued that the testimony of Mr. Gazzam is biased because of his interest in the suit, but we believe the court will see upon reading his evidence, that he would not testify to a single thing which he did not absolutely know of his own knowledge, never coloring his evidence in the slightest way to help himself, and that he would frankly admit any facts, no matter whether they would help or injure him in this case.

As to the evidence of Lieutenant Commander Evans of the Navy, we feel that it is entitled to exceptional weight in this case. Of course, proctor will claim that he was interested and biased in favor of Appellant. We think a reading of his evidence will show that he had absolutely no bias in the case, and that his sole purpose was to testify to facts as he knew or believed them to be, in answer to the questions which were propounded to him, and without regard to whether they would help or hurt the Appellant in the case. It is true that Mr. Evans had spent a great deal of time in considering this case, that he had heard or read all of the evidence in the case, and that he had made a very careful study of this evidence with a view of being a witness in the case, all of which, of course, was necessary to enable him to testify intelligently, and give his evidence any weight. But we wish to say this, that a man of Mr. Evans' standing in his profession in the Navy of this country is such, that we believe the court will be satisfied that he would not prostitute his professional standing, nor his self-respect by testifying to a single thing or expressing a single opinion that he did not actually know, or after careful consideration conscientiously believe was right.

That no amount of interest, in the outcome of a case, would cause him to color his evidence or express anything but an honest opinion, after the most careful consideration and study, and without regard to the effect it might have upon any issue in the case. He certainly was one of the best qualified witnesses to testify on the lines in which he was interrogated that could possibly have been secured, and his evidence is so clear, and his reasons so sound and so fairly and clearly given that we believe his evidence and opinions will have the greatest weight with the court. We do not believe that anything proctor may say or infer with reference to Mr. Evans' connection with the case will in the slightest degree shake the confidence of the court in the soundness of his opinions, or the correctness of his testimony.

Neither proctor for Appellee nor any witness he produced was able to answer or criticize the testimony given by Mr. Evans. All proctor can do is to criticize Mr. Evans for testifying in the case while he was a Government officer, and to claim that Mr. Evans was biased, because he took Captain Penfield's testimony as to his course and showed where the "Indianapolis" must have been under

that evidence, and the speed she must have run. We do not think the fact that Mr. Evans held a Government position in any way disqualified him from testifying in the case, nor was it improper for him to do so. Mr. Evans was not unfair nor biased in anything he testified to with reference to Captain Penfield's testimony. He did not seek to take any advantage of any mistake on Captain Penfield's part in giving his evidence; and in fact, Captain Penfield did not make a mistake until he tried to correct his evidence, after he saw its effect, by claiming the deviation of his compass was just enough to make the course *what he wanted it to be* at this particular time; but the same deviation would throw him far south of his berth at other times, so that his first testimony is shown to have been correct, and corroborates the testimony in behalf of the Appellant as to where the "Indianapolis" actually collided with the "Kitsap."

Certainly, with the burden on the "Indianapolis" to show that she was not negligent *in running into* the "Kitsap," when she had had her on her starboard for sufficient time to have stopped or kept out of the way, we do not think that the evidence offered by the Appellee will satisfy the court

that Appellee sustained that burden; and we think the court will be satisfied that there was no negligence on the part of the "Kitsap."

Proctor for Appellee brought out on cross-examination of the master and mate of the "Kitsap," that the "Kitsap" had left Pier 4 at about 4 o'clock on the afternoon of the day in question, on her regular run, and had run into and sunk a launch, and a life was lost, shortly after leaving the dock, after which she returned to the dock, and it was on her leaving the second time that she was run into by the "Indianapolis." The avowed purpose of this was to try to show that Captain Hanson was excited or nervous on leaving this second time, and that he did not know what he was doing; but of course, the real purpose was to raise a prejudice against the "Kitsap" on account of this former accident. However, the evidence disproves any claim that Captain Hanson was nervous or excited, or that he did not know what he was doing because of the first accident. He testified that the launch ran across his bow in the fog, and he hit her (R. pp. 41, 42), and of course, there is no evidence in this case to the contrary, nor any evidence of negligence on the part of the "Kitsap" in the first collision. It goes

without saying that the Court will not consider the first accident as having any bearing on the questions at issue here, and there is no presumption that it was due to any fault on the part of the "Kitsap."

Captain Hanson testified that he was not nervous on account of the first accident (R. p. 42), and Mr. Gazzam, President of Appellant Company, who saw Captain Hanson on his return to the dock after the first collision, testified that he was not nervous or excited, and that if he had been in an unfit condition to take the "Kitsap" out, he would not have permitted him to do so (R. p. 336). In fact, the first collision made the officers and crew of the "Kitsap" more cautious on going out the second time. Two look-out men were placed on the bow, all passengers were ordered off the forward deck, and the mate took a place just forward of the pilot-house, so that every possible precaution was taken to avoid another accident.

We wish to call the attention of the court to a few propositions of law and authorities which we think will be helpful in passing on the questions heretofore argued. We do not think there is the slightest doubt that the court will find the "Indianapolis" was grossly at fault, nor do we thing proc-

tor for Appellee will very seriously contend the contrary. This being true, and it being conceded that the "Indianapolis" had the "Kitsap" on her star-board bow long enough before the collision to have stopped or cleared her, and that the "Indianapolis" ran into the "Kitsap," while under the rules the "Kitsap" was required to keep her course and speed, unless circumstances required her to violate that rule, the burden was on the "Indianapolis" to show by a preponderance of the evidence that the "Kitsap" was at fault in not violating that rule, or in doing or not doing some act.

"The fault of the Mack being established beyond cavil she is not entitled to divide damages with the Rome upon criticism of her management except upon clear proof of some fault not made in *extremis*, and reasonable doubts should be resolved in her favor. *The Atlantic*, 119 Fed. 568, 56 C. C. A. 134; *The New York*, 147 U. S. 72."

Lake Erie Transp. Co. vs. Gilchrist T. Co.,
142 Fed. (C. C. A. 6th) 89.

"When the fault, primarily, is on the part of the vessel required to keep out of the way, the other having the right of way will not be held in fault except on a preponderance of proof that she did not take reasonable measures to avoid collision as soon as she had reason to apprehend danger."

Spencer on Marine Collisions, Sec. 66 and cases.

In connection with the consideration of the question as to the fault of the "Indianapolis," we call the Court's attention to the following authorities:

"The rule adopted by some maritime courts is, that a steamship should always be under such control that it can be stopped, and its direction of speed reversed, within the distance at which an approaching vessel can be seen."

Spencer on Marine Collisions, Sec. 44, citing *The Saale*, 63 Fed. 478;

McCabe vs. Old Dominion S. S. Co., 31 Fed. 234;

The Bolivia, 49 Fed. 169.

"Keeping a powerful steamer at full speed through an obscured atmosphere is negligence *per se*. The law imposes upon every vessel the duty of slackening her speed according to the density of the fog and the difficulty of clear vision, even to the lowest point consistent with maintaining steerage-way."

Spencer on Marine Collisions, Sec. 44; citing

Clare vs. P. & S. S. Co., 20 Fed. 535.

Cunard S. S. Co. vs. Fabre, 53 Fed. 288.

The Pennsylvania, 4 Ben. 257.

"The criterion of moderate speed in all cases is the ability of the ship to stop immediately in the presence of danger."

Do.

The Leland, 19 Fed. 771.

The Alliance, 39 Fed. 476.

The City of New York, 147 U. S. 72.

“A greater degree of vigilance is required of a ship navigating the waters of a harbor in foggy or thick weather, where the passage of vessels is of frequent occurrence than on the high seas, where the liability of meeting others is less. A vessel has no right to run in a dense fog near piers, docks and anchorage grounds, where vessels usually tie up or are moored, except at the slowest rate of speed possible, consistent with steerage-way, and with a due observance of every other precaution that can be invoked to guard against collision.”

Do. Sec. 49, citing

The St. John, 29 Fed. 221.

The Howard, 30 Fed. 280.

The Demorest, 25 Fed. 921.

“The starboard hand rule operates on both vessels. The one is to get out of the way by a change of course, or stopping or reversing. The other is to keep her course and speed.”

The Elizabeth, 197 Fed. 160, 162.

We would also call the court's attention to its decision in the case of *The Belgian King*, 125 Fed. 859.

The only evidence introduced by Appellee, as

directly tending to show the speed of the "Kitsap" at the time of the collision, was the evidence of the master and mate of the "Indianapolis," and of the witnesses Jacobs and Percival. The rules already referred to as to the weight to be given evidence of persons on one boat concerning the speed of an approaching boat, apply to all of these witnesses; and the well-known rules applying to the testimony of interested witnesses, apply to the testimony of the two officers of the "Indianapolis." It clearly appears that the witnesses Jacobs and Percival were mistaken about the speed at which the "Indianapolis" was run from the bell-buoy to the point of collision, and being mistaken in this material fact, of course, doubt is thrown upon their testimony as to the speed of the "Kitsap."

"When witnesses directly contradict each other upon a main point in issue, greater weight should be given, other things being equal, to the testimony of those whose statements on other material points have not been proved incorrect, than to the testimony of those who have made mistakes. Where a witness testifies to an event consisting of several incidents, for instance, an outside observer testifying concerning a collision between two vessels, and it appears that he is mistaken in some particulars, even though of no great moment in themselves, it indicates that he was not so clear and accurate an observer as to justify giving his version of the occurrence higher credit than that of another witness of equal oppor-

tunity for observation who is not convicted of errors."

Moore on Facts, Sec. 1088.

In connection with the testimony of witness H. A. Evans, for Appellant, and Frank Walker, for Appellee, as to their opinion of the speed of the two vessels drawn from an examination of the cut in the "Kitsap," we call the court's attention to the language in a British Columbia case decided by Sir Matthew B. Begbie, L. J. A., as follows:

"It can be mathematically proved that the theory of the Cutch as to the conditions of the actual collision is entirely baseless. It would be mathematically impossible that the Joan, throwing herself at the rate of ten knots per hour across the bow of the Cutch, a nearly stationary ship, as the defendants' witnesses would appear to suggest, could cause the injuries described and not disputed, viz., a deep cleft nearly perpendicular to her beam. If the injuries were occasioned as the defendants contend, the rent would extend in a direction from the stem of the Joan toward her stern, and would be mainly external, without much penetration. But if two vessels of nearly equal size and speed, of equal momentum, collide at an angle of about 45° , the injury will extend inwards into the vessel that receives the shock, in a direction nearly perpendicular to her beam. This will be apparent on drawing the necessary diagram so as to show the resultant thrust; the impetus of the recipient vessel being exactly represented by an equivalent thrust in the direction opposite to her motion. That is to say, the injury

inflicted, and shown to have been suffered by the Joan, is exactly explained by the plaintiffs' account of the position and speed of the vessels, though their witnesses did not seem to understand that; and is quite irreconcilable with the circumstances suggested by the defendants."

The Cutch, B *British Columbia*, 357, 361; 3
Can. Exch. 362, 368.

Appellant claims that, contrary to her usual course and custom, on the trip in question, the "Kit-sap" ran at a high rate of speed down the face of the docks, far out of her course, in this dense fog, without showing any reason why she should have done so. To do this, of course, would be manifestly running a great risk of losing the vessel and possibly the lives of those aboard. It is a well settled principle of law that the presumption is that persons will not run unnecessary hazards or risks, and we think the following observations of *Moore on Facts*, and the cases cited by him, are pertinent to a consideration of this claim of Appellee.

"There is always a presumption of more or less weight that those in charge of a vessel will not subject their lives to hazard by neglecting to maintain a vigilant watch, especially in a state of the weather, such as wind, rain and darkness, which makes navigation difficult. * * *

In a collision case between vessels the suggestion that the smaller and weaker steamer sought the collision was not entertained, since it was inconsistent with the strongest motives which usually govern human actions. * * *

The presumption that men will not carelessly expose themselves to peril aids circumstantial evidence of the degree of daylight at the time of a collision between vessels."

Moore on Facts, Sec. 559.

"The danger and injury to both vessels is so great in almost every case, one or both not unseldom going down with all on board, that the strongest motives exist with all to use care and skill to avoid collisions. The want of them, therefore, is never to be presumed, but is required to be clearly proved. To presume otherwise would be to presume men will endanger their own lives and property, as well as those of others, without any motive of gain or ill will."

Waring vs. Clarke, 5 Howard (U. S.), 441, 501.

In this case, the presumption as to the "Indianapolis" has been fully overcome by the admissions of Captain Penfield and Engineer Thorn that the vessel did run for five minutes, through the fog, toward the docks, at her full speed; and by the fur-

ther fact that during the succeeding two minutes before the collision she must have continued at practically this speed in order to have reached the point of collision. But the presumption prevails in favor of the "Kitsap," as against the testimony of the four witnesses for Appellee who claim to have stood on the end of the Colman Dock, and to have seen the "Kitsap" racing full speed past that dock, out of her course, in the dense fog, without any known purpose or motive and against the positive testimony of a large number of witnesses.

It will be noticed that neither the master's log nor the engine room log of the "Indianapolis" was produced at the hearing in this case. Of course, the logs of the "Kitsap" could not be produced, as she was sunk within a few minutes after being struck. It will also be remembered that neither the quartermaster, who, Captain Penfield testified, was at the wheel of the "Indianapolis," nor any look-out on the "Indianapolis," if there was one, as alleged in the cross-libel, were offered as witnesses in the case, nor was their absence explained. It appeared (R. p. 294) that the engine room log was, at the time Engineer Thorn testified, with the United States Inspectors, but no reason was given why it was not ob-

tained and offered in evidence, nor any reason given why the captain's log was not offered. It is a well-known rule of law that the non-production of material evidence raises a presumption that it would be unfavorable if produced.

“Where the evidence tends to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed and to rebut the inferences which the proof tends to establish, and he neglects or refuses to offer such proof, the natural inference is that the proof, if produced, instead of rebutting, would support the inference against him.
* * *

Where the burden of proving a defense in a collision case was cast upon the respondent, the neglect of the latter to produce some of its seamen who had deserted, but who by reasonable diligence, the court thought, could have been found, was ‘open to remark.’ ”

Moore on Facts, Sec. 564.

“Where the credibility of a witness is put in doubt, but his testimony is susceptible of corroboration, the court will probably take notice if no effort is made to substantiate his statement. * * * A party can hardly hope to overcome a strong presumption by force of his own testimony alone if he fails to produce available witnesses to corroborate him. * * *

Failure of a ship against which the evidence is strong in a collision case, to produce all of her officers and crew as witnesses, necessarily puts her claim at a disadvantage."

Moore on Facts, Sec. 566.

DAMAGES.

The damages sustained by the "Kitsap" are easy to be determined under the ^{settled} ~~said~~ rules of law applicable thereto, as Appellee did not introduce any testimony to contradict the evidence of Appellant as to these items.

"It is the general rule in collision cases that the measure of damages is the actual loss suffered."

The Columbia, 109 Fed. 660 (C. C. A. 9th Circuit); also

Societe, etc., vs. O. R. & N. Co., 178 Fed. 324.

"The measure of damages in case of a partial loss is the amount necessarily incurred in repairing the vessel and in restoring it to a condition as good as it was before the collision, with interest on the amount so expended, together with the damages incurred by reason of the loss of the services of the vessel from the time of its disability until again restored to a seaworthy condition, together with such disbursements and expenses as directly result from the collision and are incurred *on behalf of the injured ship* in restoring it to the condition in which it was prior to the injury inflicted. * * *

Restitution for the loss sustained and no more is the rule for determining the amount of damages in case of partial loss." (Italics ours.)

Spencer on Marine Collisions, Sec. 197.

The damages claimed by Appellant are as follows (R. p. 433):

Expense for salvage	\$12,712.20
Expense for repairs	12,313.00
Depreciation for damage to boiler by sub- mersion	1,500.00
Expense for survey	25.00
Expense for superintendence of repairs	566.67
Demurrage for 139 days at \$103.00 per day	14,317.00
Value of stores destroyed	100.00
<hr/>	
Total	\$41,533.87

Appellee does not question the item as to cost of repairs, and proctor expressly stated that he would not dispute Appellant's evidence as to their reasonableness (R. p. 135). The amount allowed by the trial court is \$12,313.00, which is the amount claimed by Appellant.

The item of \$25.00 for survey of the "Kitsap" was allowed by the trial court and was proper.

The Switzerland, 67 Fed. 617.

The Alaska, 44 Fed. 498.

The item of \$566.67 for expense for superin-

tendence of repairs claimed by Appellant and allowed by the court, was proper and is not contested.

New Haven S. B. Co. vs. The Mayor, etc., 36 Fed. 716.

The value of stores destroyed was agreed to be \$100.00, which was allowed (R. p. 141).

The items of the "Kitsap's" damage which are in dispute here are the expense for salvage, \$12,712.20, which was allowed by the trial court; the item of \$1,500.00 for depreciation in the boiler by reason of being submerged, which was disallowed by the trial court; and the amount of demurrage, which the trial court allowed at \$50.00 per day instead of \$103.00 per day, as claimed by Appellant. We will discuss these items in their order.

Salvage. Appellee assigns as error the allowance by the trial court of the item of \$12,712.20 for salvage of the "Kitsap." The evidence shows that the "Kitsap" was sunk in about 240 feet of water, and it is alleged in the libel that she was a total loss. However, by the time of the trial it appeared that she had been raised and was afterwards repaired, so that damages as for a partial loss, including the cost of raising and repairing her and demurrage, were allowable instead of her value.

Appellant called S. B. Gibbs as a witness in its behalf, who testified that he was agent and surveyor for the San Francisco Board of Marine Underwriters, residing at Seattle; that he "represented the underwriters in the matter of the collision between the 'Kitsap' and the 'Indianapolis' " (R. p. 108); that he was the representative "of the underwriters of the 'Kitsap' " (R. p. 113); that after the collision, on behalf of the underwriters, he made a contract for the salvage of the steamer, which contract was offered and received in evidence as Libellant's Exhibit C. The contract is an agreement between the Elliott Bay Dry Dock Company and S. B. Gibbs, "agent for the underwriters of the S. S. 'Kitsap,' " by which the Dry Dock Company undertook to raise and deliver the "Kitsap" for sixty per cent of her value when delivered, if the vessel when raised could be repaired, the repaired value being agreed to be \$35,000.00, which was her value for insurance purposes (R. p. 124); or if she could not be repaired at a cost less than this repaired value, then sixty per cent of whatever amount was realized from the wreck, by sale, break-up or otherwise. Appellant, as owner of the vessel, consented that the underwriters might enter into this contract without

prejudice to the rights of either party under the policies of insurance on her.

Captain Gibbs also testified that, in his opinion, this contract was a fair and reasonable contract for the raising of the vessel, in the condition in which she was found (R. p. 109), and there is no evidence to the contrary. He testified that after the vessel was raised a survey was had to determine what repairs were necessary to the vessel; that bids were called for, and a bid of \$12,313.00 for such repairs accepted, which he stated was the lowest bid, and in his opinion a reasonable one (R. p. 110).

Appellant claimed an item of \$1,500.00 damage to the boilers of the "Kitsap" by submersion, which could not be and was not repaired. This amount, added to the \$12,313.00 cost of repairs actually made, or \$14,813.00, deducted from the agreed valuation of \$35,000.00, was the salved value of the vessel, of which the salvors were entitled to sixty per cent, or \$12,712.20, the amount of salvage claimed by Appellant and allowed by the trial court. Captain Gibbs testified that, although this amount had not been paid at the time he gave his evidence, the underwriters had obligated themselves to make the pay-

ment, and, of course, the ship was liable for such amount.

Appellee did not offer any evidence to contradict this testimony, nor to show that the cost of salvage was not reasonable; but it argued in the court below, and will probably argue here, that Appellant did not show itself to have suffered anything by reason of the salvage operations, as distinguished from the repair bill, because it neither contracted to nor did it pay out anything for salvage; that certain persons claiming to have been underwriters entered into the salvage contract, but that they are not parties to this case; and, while if they were underwriters, they might under their policies be subrogated to Appellant's rights, these facts are not shown, and that no party to the record in this case is entitled to this item. However, the trial court allowed this item and we think correctly. As shown by the authorities above quoted, the damage for which the "Indianapolis" and her stipulators were liable, if at all, is the expense of restoring the vessel to a condition as good as it was before the collision, which included all expenses and disbursements directly resulting from the collision, and which were "incurred on behalf of the injured ship." We think

the amount Appellant, as owner of the ship, is entitled to recover is the amount of damage sustained by the ship, which amount, in the absence of evidence to the contrary, is presumably the amount paid to restore her to the condition in which she was before the collision, besides demurrage for loss of her use. We do not think it makes any difference whether Appellant actually paid out any of these amounts, or whether they were all covered by insurance, or whether some one voluntarily raised, repaired and restored the vessel to Appellant without any cost to it. To hold otherwise would be to hold that a person or vessel causing damage to another would have the benefit of any insurance on the vessel, or any gift which might be made to the owner of the vessel in connection with repairing the damage caused by the offending vessel.

It would ^{not} be contended that if Appellant had made the contract for salvage itself, instead of the underwriters on the "Kitsap," that the item should not be allowed. Nor if the vessel had been sold under the salvage contract, Appellee would not contend that Appellant could not recover its loss on that account. If Appellant had itself paid the amount called for by the salvage contract, Appellee would

hardly contend that Appellant could not recover the same. If volunteers had salved the vessel, and Appellant had been compelled to pay the amount in question, in order to regain her, Appellee would admit that Appellant could recover this amount; and certainly if, instead of Appellant actually making this payment itself in the first instance, the underwriters under their insurance contract, either paid this amount to volunteer salvors, or to salvors under the salvage contract, and then deducted this amount from the insurance due Appellant, or left this matter for adjustment under the policies of insurance, Appellee and the "Indianapolis" could not be relieved from a payment of this amount to Appellant as owner. We do not think it makes any difference whether the obligation for salvage, or its payment, was incurred or made in the first instance by the insurers of the "Kitsap," and then adjusted between the owner and the insurers, or whether the same was incurred or paid in the first instance by the owner, and then adjusted between it and the insurer. To hold in this case that the Appellant cannot recover this item of salvage, which it is admitted was necessary and reasonable, and the result of the collision, is to hold that in a collision case an owner cannot

permit his underwriters to salve the ship, as they have a right to do, under penalty of losing the cost of salvage, which he could collect if he salved the ship at his own expense in the first instance, and then collected the same, or such part thereof as he might be entitled to from the underwriters. There is certainly no law to sustain such a contention as to this item. On the other hand, the law is well settled that it is no defense to an action for damages for collision that the injured party has received insurance for the damage incurred.

“It is no defense to an action for damages for collision that the injured party has received insurance for the damages incurred. The party at fault may not shield himself by showing satisfaction for the damages received through payment by another. The insured in such cases may recover as fully as though no insurance had been received. The insurer, however, has the right to claim whatever damages are recovered, the insured being his trustee for an amount equal to the insurance paid. The insurer may, if he sees fit, maintain an action in his own name against the vessel at fault.”

Spencer on Marine Collisions, Sec. 207.

Whether or not the underwriters had a right of subrogation for the amount of salvage, if any, they paid in this case, makes no difference, because, as stated by Spencer in the last quotation, it is optional

with the underwriter whether he will claim a subrogation for the amount he has paid, or whether he will permit the owner to recover the entire damage, and hold him a trustee for the amount the underwriter has paid out under the policy of insurance.

In the case of *Fretz vs. Bull*, 12 Howard (U. S.) 466, the Supreme Court of the United States squarely held that the owner of a boat and cargo destroyed by a collision might maintain an action for the entire loss, even though he had received from the underwriters a part of such loss. In that case, the action was commenced by the owner for the use of the underwriter, and the court held that it was not a substantial objection that it was so brought; but, of course, it was not necessary to state in the action that it was for the use of the underwriter, because that might or might not be true, according to the terms of the insurance contract, which had nothing to do with the liability of defendant. It was no concern of the vessel at fault who was entitled to the money as between the owner and underwriter, and it certainly could not escape liability because the underwriter had paid the owner a portion of his loss. Of course, a recovery by the owner would be a bar to an action by the underwriter against the

offending vessel, and this is all that the offender is interested in, so far as this question is concerned.

The Supreme Court of the United States in the case of *The Patomac*, 105 U. S., 630, 634, said:

“The mere payment of a loss by the insurer does not indeed afford any defence, in whole or in part, to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured.”

In that case it appeared that by the express terms of the policies of insurance, the insurers, upon the payment of the loss, were entitled to demand from the insured either an assignment of his right to recover damages against the offending ship for the loss so paid for, or to bring suit for such damages in his name, and to hold for their own use such proportion of those damages as the amount insured bore to the valuation of the insured vessel; and in that case, the underwriters had released the offender to the extent of the underwriters' interest in the damage recoverable. Under those circumstances, and in view of those facts, the court held that the insured could not recover the portion of damages which it appeared belonged to the underwriters, and *which they had released*.

Of course, in this case, no such facts appear, nor does it appear what the respective rights of the underwriters and the owners are as between themselves. Under the rule laid down in these authorities, Appellant has a right to recover the entire damage to the ship, which admittedly included this item of salvage.

“The underwriters upon a ship, A, sunk by a collision with B, cannot sue B or her owners in their own names. Their only right of action is by subrogation to the rights of the owners of A; and they must sue in the names of the owners of A.”

Marsden's Collisions at Sea, Sixth Edition,
p. 98.

“If the assured, after receiving the amount of his loss from his insurers, recovers damages from the wrong-doer in the collision, he is a trustee of such damages for the underwriter. But the fact that the plaintiff in a collision action has been compensated for his loss by his insurers is no answer to his claim for damages against the wrong-doer.”

Do. pp. 277-278.

It makes no difference in this case whether the underwriters incurred the obligation for salvage themselves, or even paid the amount due for salvage direct to the salvors, or whether they required or permitted Appellant to incur such obligation or pay such salvage, and then reimbursed Appellant therefor. We think the authorities are conclusive in this question.

DAMAGE TO BOILER.

One of the items of damage to the "Kitsap" claimed by Appellant, was \$1500.00 for depreciation of her boilers due to their submersion. The evidence shows that after the "Kitsap" was raised, a survey was made by Captain S. B. Gibbs and Mr. T. W. C. Spencer (R. pp. 109, 134), for the purpose of ascertaining the damages caused by the collision and by submersion (R. p. 110). An agreement had been entered into between the salvor, the underwriters and the Appellant, that in case of any dispute arising on the survey, such dispute should be submitted to an umpire, whose decision should be binding. Pursuant to this agreement the question was submitted to Mr. H. A. Evans, as umpire, as to whether or not the boilers had been damaged by submersion after the collision, which damage could not be repaired. Mr. Evans made an award of \$1500.00 for such damage (R. pp. 113, 125, 126).

Appellee did not offer any evidence that the boilers were not damaged by the submersion, nor that the allowance was not a reasonable one; and this damage was not repaired. Appellant took the vessel, after she was raised and repaired, with her boilers depreciated in this amount, under the uncontradicted

evidence; and as Appellee was liable for whatever damage the "Kitsap" sustained because of the collision, it seems to us clear and proper, under the evidence, that this item should be allowed. Certainly, if it was not a proper item to allow against the Appellee, it was not proper to charge the salvor with its sixty per cent of the item, and the salvage item allowed in this case should have been increased \$900.00. Because by disallowing the \$1500.00 item the cost of repairs would be only \$12,313.00 for those actually made, which, deducted from \$35,000.00, leaves \$22,687.00, of which the salvor would be entitled to sixty per cent or \$13,612.20, instead of \$12,712.20 allowed by the trial court. As the judgment stands, Appellant not only is compelled to take its vessel depreciated \$1500.00 in value after repairs made, but should pay the salvor \$900.00 more than the court allowed it. The facts all appear in the record here, and we think the court should either allow the item in full as claimed, or increase the salvage award \$900.00.

DEMURRAGE.

It is, of course, conceded that Appellant, if entitled to recover at all, is entitled to demurrage for loss of use of the "Kitsap" from the time of the collision until she was repaired. There is no dispute that this time was from December 1, 1910, to and including sixty working days from February 18, 1911, which would be May 2, 1911, making one hundred and thirty-nine days (R. p. 111).

The "Kitsap" was being operated by Appellant upon a regular daily run, which Appellant had had established for about six years, and upon which it had a contract to carry the mail (R. pp. 135, 136), for four years from July 1, 1910. It had a right, and was bound to keep a vessel on this run, both to perform its mail contract, and so as not to lose its established business. To do this, it was necessary to place some other vessel on the run while the "Kitsap" was being raised and repaired. It did place the "Hyak," another of its vessels, of like character and type of the "Kitsap," on the run (R. pp. 136, 138). It was stipulated that the charter value of the "Hyak" was \$175.00 per day (R. p. 297), and the evidence showed that the cost of her operation was \$72.00 per day, leaving a net charter value of \$103.00

per day (R. pp. 127, 138) for the "Hyak." It was further stipulated that the net earnings on the run during this period, if a material way to determine the amount of demurrage, were \$50.00 per day. The trial court allowed Appellant demurrage at the rate of \$50.00 per day only, for the 139 days it lost the use of the "Kitsap," and Appellant assigns as error, the refusal of the trial court to allow the net charter value of the "Hyak," or \$103.00 per day, for this period. The undisputed evidence is that the net charter value of the "Kitsap" would be a little more than that of the "Hyak," because of cheaper operation (R. p. 138).

It is true that the "Hyak" belonged to Appellant, and that at the time she took the "Kitsap's" run she had no charter or regular run. But we submit that this fact is immaterial. She might have had such a charter at any time, as she had had the year before (R. pp. 138-19), and by using her in place of the "Kitsap" Appellant lost any chance of such a charter. Certainly if Appellant had not had a spare boat fit for this run, it could have chartered such a boat and recovered her cost as demurrage. We cannot see why a different rule should apply, merely because it used its own vessel, thereby losing her use

otherwise. If Appellant had chartered the "Hyak" from some one else, it could have recovered the net cost of such charter; and there is no reason why Appellee should have the benefit of Appellant's investment in this substituted vessel, which the undisputed testimony shows was of the value of \$50,000.00 (R. p. 125). To allow Appellant \$103.00 per day demurrage for use of the "Hyak" is only to allow what it would have had to pay if it had not this investment in the "Hyak," but had been obliged to charter from others. It would in no sense be adding to Appellant's profits, but merely making it whole for the loss of the use of the "Kitsap."

To show that we are correct in this contention, let us look at the matter in another way. Appellant was entitled to be *made whole*, nothing less, nothing more. If the "Kitsap" had not been lost, it would have had that vessel to keep the run in question, and would also have had the "Hyak" open for charter, with a net charter value of \$103.00 per day. By the loss of the "Kitsap," and placing the "Hyak" on her run, Appellant lost the use of, or chance to use the "Hyak" otherwise, which was a loss to it of her net charter value. Appellant could not be made whole

unless it recovered that value and maintained the "Kitsap's" run.

"The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention, should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner from lack of enterprise, or inability, failed to have an available substitute for use in such an emergency."

State of California, 54 Fed. 404, 407.

In the above case, there was no evidence as to the charter value of the vessel damaged, that this court determined the demurrage from the only evidence in the case, to-wit: daily earnings. But the rule we contend for is recognized in that case, which is supported, and the reasons therefor stated, in this and the following authorities.

The owners substituted another of their boats for the injured boat. Held that they had a right to do this, and "are entitled, therefore, to charge for the use of their own boat at the market value of its use, for the time being, precisely as if they had hired her from other owners." Demurrage to the amount of the value of the use of the substitute boat was allowed.

New Haven S. B. Co. vs. The Mayor etc., 36 Fed. 716.

“The true measure of loss from detention under the circumstances here shown, is the cost of substitution. When furnished a suitable vessel to take the place and do the work of the other, her owners are fully compensated, in this respect. The cost of such substitute accurately measures the market value of the other’s services. The value of her charters may not; other considerations enter into this. * * * The cost of a proper substitute is therefore the measure of loss for detention, wherever its application is practicable.”

The Emma Kate Ross, 50 Fed. 545 (C. C. A. 3rd Cir.).

“The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market.”

The Conqueror, 166 U. S. 100; also

The North Star, 140 Fed. 263;

The “Potomac,” 105 U. S. 630;

The Columbia, 109 Fed. 660;

Societe etc. vs. O. R. & N. Co., 178 Fed. 324.

Under these authorities, and the undisputed evidence and stipulations, we respectfully submit that the trial court erred in not allowing Appellant demurrage at the rate of \$103.00 per day for 139 days, or \$14,317.00.

INTEREST.

Appellant assigns as error the failure of the trial court to allow it any interest on the amounts which were found it was entitled to.

“In computing the amount of damages to be allowed the party entitled to recovery, it is proper to allow interest on the amount expended for repairs and on the amount of demurrage charges that the prevailing party is entitled to, from the date when the various items of expense were incurred, and from the last day of detention, where demurrage is recovered.”

Spencer on Marine Collisions, Sec. 206.

While it has been stated that the allowance of interest is largely in the discretion of the court, we think this rule does not apply in a case like this, especially if, as we have contended, the “Kitsap” was without fault.

The State of California, supra.

The salvage was due on February 18, 1911, when the contract for repairs was let (R. p. 111), so the amount of salvage could be determined, and we think interest on the item of salvage should have been allowed from that date.

The cost of repairs was due May 2, 1911, when

the vessel was to be turned over to Appellant under the repair contract, and demurrage was also due on that date; we think interest should have been allowed on these items from that date. The other items of damage, to-wit: \$1500.00 for depreciation to boilers, \$25.00 paid for survey (R. p. 133), \$566.67 expense of superintendence, and \$100.00 for loss of stores were all due on that date, and we think interest should be allowed on these items also from that time. Under the decision of the trial court, which was made more than one year after all these expenses, aggregating \$41,533.87, or \$32,666.67 allowed by the court, had been incurred by Appellant, it lost interest on this large sum, and penalized that much more than Appellee, whose damage was small. We feel that in law and good conscience, Appellant is entitled to interest as claimed.

COSTS.

Appellant assigns as error, the refusal of the trial court to allow its costs in the lower court. Of course, if Appellant is correct in its contention that the "Kitsap" was not at fault, and Appellant should have recovered its full damages, instead of having the damages divided, costs in the lower court should be awarded to it.

In conclusion, we wish to say that we have extended our argument to considerable length, because we feel the importance of the case justifies it, and a proper understanding of the questions involved requires it; and we respectfully ask this court to give the evidence the careful consideration we feel is required in order to understand and determine the facts of the case. We think the memorandum decision of the trial judge shows that he did not understand the facts of the case. The case was argued the first part of November, 1911, but was not decided until May 28, 1912. Necessarily the court had forgotten much of the argument made ~~eight~~^{seven} months before. All of the evidence was taken before the Commissioner and reported to the trial court, who, therefore, had only the type-written testimony before him, and did not see any of the witnesses. The Commissioner did not

make any findings in the case. The trial judge was therefore in no better position to pass upon the facts than this court is. It is well settled that in such cases, in admiralty, this court does not in any way feel bound by the decision of the lower court, but, being in as good a position to pass upon the facts, will decide the case as though it had come before it in the first instance.

The Santa Rita, 176 Fed. 890 (C. C. A. 9th Cir.).

It is a fact well known to this court, that the trial judge, who heard and decided this case below, practically all the time after the case was submitted to him, had the work of two judges to carry. The record in the case is very long, and much of the testimony relates to matters occurring within a short space of time; and the question of fault of either vessel depends to a considerable degree upon careful consideration and comparison of the testimony of different witnesses, the plotting and measurement of courses, and calculation of speed, the measurement of angles of cut, and the consideration of other like evidence, which requires considerable labor and study.

We have tried to assist the court in these matters by our testimony, especially that of witness H. A.

Evans, an expert of exceptional ability, to whose testimony we respectfully ask that especial attention be given.

We feel that the memorandum decision of the trial judge shows that he did not give the time to the consideration of the evidence which was necessary to fully understand it; otherwise he could not have made a finding that the "Kitsap" turned "around on her regular course," and at the same time find the point of collision to be more than one hundred feet away from the nearest point to that regular course, as shown by Appellee on its own Exhibit 9. Nor do we think he could have found the "Kitsap" was travelling at a "high rate of speed," if she was on her regular course. Nor could he have disregarded the testimony of the witnesses on the "Indianapolis" as to her own speed, and based a finding as to the "Kitsap's" speed on their evidence alone, as he must have done if the "Kitsap" turned on her regular course, which would not be in sight in the fog of the four witnesses on the end of the Colman Dock. Nor would he have disregarded the testimony of those on the "Kitsap" as to her speed, but believed their testimony as to the speed of the "Indianapolis." Nor would he have believed the testimony

of Appellant's witnesses as to the course of the "Kitsap," and disbelieved it as to her speed and the point of collision. Nor would he have disregarded the mathematical calculations of Mr. Evans as to the speed of the "Kitsap" upon her regular course, when he found the time of the "Kitsap's" departure and the collision to be as Appellant claimed and as was not disputed, and the same time upon which Mr. Evans' calculations were based. All of which could be easily verified by a little calculation based upon exhibits offered by either party.

For these reasons, and the importance of the case, we have extended our argument, and attempted to point out the evidence and where it is found in the record, to sustain our contentions, to assist the court in finding and understanding the evidence. We firmly believe that after this court has read and considered all the evidence in the case, it will be fully satisfied that the "Indianapolis" was guilty of gross negligence, and that the trial court was in error in finding any fault on the part of the "Kitsap." In that event, we will be entitled to a reversal, and a decree for full damages to the "Kitsap," with interest and costs in both courts. We also think that our contentions as to the damages Appellant is entitled to

recover, will be found sustained by the law and the evidence.

We respectfully submit that the decree of the lower court should be reversed, and a decree entered for Appellant's full damages as claimed, with interest and costs.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,

Proctors for Appellant and Cross-Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTA-
TION COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

STEAMSHIP "INDIANAPOLIS,"
her engines, boilers, tackle, apparel
and furniture,

Respondent and Appellee,

INTERNATIONAL STEAMSHIP
COMPANY, a corporation,
Claimant and Cross-Appellant.

No. 2183

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee and Cross-Appellant

IRA BRONSON,
Attorney for Appellee.

SEATTLE, WASHINGTON

In the United States Circuit Court of Appeals

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WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee and Cross-Appellant

STATEMENT OF THE CASE.

The cross-appellant, who in the interest of brevity will designate itself as the appellee, is content with the statement of the case made by the appellant so far as it relates to the pleadings, and no further. The

statement made by the appellant as to the decision of the court below might better have been omitted, or else the full opinion of the court recited. Appellant's statement falls into a very common error of brief writers, namely: the assertion that the other side "admits this and that;" or that "such and such are not disputed;" and the statement includes a great many things which counsel for appellant may think are true, but which are not undisputed and which are not admitted, and which we contend are not true. We desire to amend appellant's statement in a number of points. We note the contention of the appellee, that the size of the two vessels was by us claimed to be and evidence was offered to prove them to be, not only greater in weight for both ships, but that a greater disproportion existed between their weights than claimed by appellant. The materiality of this evidence being its effect upon statements of witnesses as to the extent of the damage which a vessel of the size, form and weight of the "Indianapolis" would do to a vessel of the size, form and weight of the "Kitsap," if the "Indianapolis" were proceeding under any considerable headway; and as we shall argue later, any considerable headway would have driven her through the "Kitsap" under such circumstances. We desire to correct the statement at

the end of the first paragraph on page sixteen of appellant's brief with reference to the distance between the south side of Pier Four and the north side of the Colman Dock; and to submit that in our opinion the evidence shows the distance to be over eight hundred feet, to be exact, eight hundred and twelve feet. This is material, as will be hereafter argued, as every additional one hundred feet that the Kitsap had to travel in order to reach the collision, which subsequently occurred within a given time, increased her speed. We desire to take issue with the second paragraph on page sixteen of the statement of the case, by stating more fully the exact facts.

The regular course of the "Kitsap" was to back away *free handed* from the *north* side of Pier Four, turning on a port helm as she came ahead, southerly and southwesterly, to turn in an opposite direction on her course. On leaving her dock on the trip which resulted in the collision, she backed away from the *south* side of Pier Four, which not only brought her the width of the dock further south, but she had to swing around the end of the dock before she could even complete her backing up movement, and this also is material. We desire to correct the statement at the bottom of page sixteen in so far as the same is asserted to be undisputed, "that a very dense fog

lung over Elliott Bay." This evidence is not only disputed, but as we shall point out, the chief witness and principal owner of the "Kitsap" will be shown to have disputed it, if it applied to the *whole* bay. It was undoubtedly much heavier on the Seattel shore, mingled as it was with the city smoke, and was thinner, extending into waves and patches, and finally cleared entirely as the harbor was left.

We desire to correct the statement of the appellant contained in the last six lines of the first paragraph on page seventeen. It is not admitted; it is not undisputed, that the Indianapolis struck the "Kitsap" as distinguished from the "Kitsap" striking the "Indianapolis;" it is not undisputed that the "Kitsap" sank in about twenty minutes; and we submit that the great weight of the evidence was that she sank in a much less time; and that, in a period of time ranging between five and ten minutes.

As supplementing our correction of appellant's statement of the case, we desire to add, that it is our contention that the facts in this case, when stripped of speculation and the wildest kind of guess work, will show that the steamer "Kitsap," after having left the north side of Pier Four on the afternoon in question, proceeded at a rapid gate out into a foggy

condition on the bay and struck and sank a launch, drowning one man; that she returned to her dock, landing, however, at the south side; and within a short space of time was ordered by her owners to proceed upon her course; and that she this time backed out into the fog and headed south along the face of the docks to the southward of the Colman Dock, making a wide and deep sweep into the bay, crossing going south, where she had not the right of way, the path of in-coming vessels, among which was the "Indianapolis," which was by her master and mate known to be then due and over which apprehension was keenly felt by both mate and master; that she finally swung northward and northwestward; and after proceeding a minute in a northwesterly direction sighted and struck the "Indianapolis;" and was sunk, and was subsequently found where she sank, and where one of the chief witnesses of the libellant said she was found, to-wit: "off the Colman Dock." If we satisfy the court of this one fact, we have but to call the court's attention to the admission of her master, that if she did such a thing she did a highly dangerous thing, and we have established her negligence beyond recall. And we shall argue that this negligence consisted not only in violating the rules of the road, (if they apply to a crossing in the fog), and

in turning a dangerous course in a fog, but that the distance she had to travel between two given periods of time, established as her time of departure and the time of collision, would have necessitated her proceeding at a high speed from the dock to the point of collision.

As to the right of way and the application of the crossing rule, we are aware that upon sound principle and supported by decisions, they do not apply in a fog for the reason that vessels can not then determine each other's course. It may be said in this case, however, that if they should ever apply in a fog here is the case, because as the "Kit-sap" started out down the water front with the docks on her port side, she knew that she had all inbound vessels on her starboard hand.

We submit that the competent and credible evidence heavily preponderates in favor of the fact that the "Indianapolis," after passing the Duwamish bell buoy, while in misty weather, traveled at her usual full speed for five minutes, during which time the captain could see with a fair degree of safety far ahead of the point within which he could stop the ship and during that time traveled one and one-fourth nautical miles. That he then in successive

stages slowed his ship, until at the time of collision, she was practically at a stand still and was not under sufficient headway to have caused any serious damage from her own motion.

In this connection the fog signals of the two steamers should be taken into consideration. It is contended by the appellee that the signals of the "Kitsap" were heard first on the port bow of the "Indianapolls" and then ahead; and that she was supposed to be passing ahead of the course of the "Indianapolis;" and then that the signals turned and were heard from off the starboard bow and rapidly approaching.

Counsel for appellant argues that it is difficult to accurately locate sounds in a fog, and seeks to apply this fact to the evidence of the appellee. He apparently, however, reasons that sounds in a fog heard by the appellant's witnesses were not subject to this element of frailty.

The appellee contends that the finding of the court below that the collision resulted from any fault on the part of the "Indianapolis" is not sustained by the evidence.

The appellee further contends that even if the collision did result from mutual fault, that the ef-

fort of the appellant to more than recoup its loss and to make a profit out of its accident at the expense of the appellee, wholly warrants the appellee in insisting that the record in this cause does not show that any party to this record has suffered any loss or damage by reason of the salvage operations which were undertaken in raising the "Kitsap;" and that the court below erred in allowing the item of \$12,712.20 for salvage.

In maintaining the appellee's appeal the following formal specifications of error are relied upon:

I.

That the court erred in finding and decreeing that the collision mentioned in the pleadings between the steamer "Kitsap" and the steamship "Indianapolis," resulted from the mutual fault of said steamer "Kitsap" and said steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said steamer "Kitsap."

II.

That the court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the pleadings therein, should be di-

vided, and that the libelant should recover one-half of the damage sustained by it and resulting from said collision; and that the cross-libelant and respondent should pay to the libelant one-half of the damages to said steamer "Kitsap" found to have resulted from said collision, and in refusing to award to the cross-libelant and respondent all of the damages resulting to the steamship "Indianapolis" from said collision.

III.

That the court erred in allowing to the libelant in any event any part of the sum of twelve thousand seven hundred twelve and 20-100 (\$12,712.20) dollars for the salving of the steamer "Kitsap."

IV.

That the court erred in not awarding to the cross-libelant and respondent the full damages sustained by the cross-libelant and respondent for all of the injuries, demurrage and loss resulting from said collision to said steamship "Indianapolis."

ARGUMENT.

In the opinion of the appellee this whole case hinges sharply and clearly upon the place where the collision occurred. As this point is a controlling feature in determining the previous speed of the "In-

dianapolis" and *both the course and the speed of the "Kitsap" previous to the collision.* The "Indianapolis" had to proceed eastward to this point from the bell buoy, within the time covered by the evidence and the "Kitsap" had to proceed southerly and westerly and northerly upon a course within the time given in the evidence, to reach this point. As to its distance from the Colman Dock, the court will have to rely upon rather approximate estimates. As to the fact that it was off the Colman Dock and in line between the Colman Dock and the bell buoy, we think it is futile for the appellant to dispute. If we are not mistaken the only witness of the appellant who pretended to locate the place where the "Kitsap" was found was Capt. S. B. Gibbs, who in answer to the question of counsel for the appellant as to whether she was found "off the docks at Seattle," answered, "Yes sir, off the *Colman Dock.*" (R. p. 103.) Counsel all through the record refers to "off the docks." His witness said: "Off the Colman Dock." If it were necessary to supplement the evidence of the appellant, the appellee introduced in evidence photographs taken from the south side of the Colman Dock of the dry dock anchored to the wreck of the "Kitsap" before she was raised, which photographs were sighted along the straight edge side of the house of

the dock, and which show the barge straight out in front (and they incidentally show the "Indianapolis" as she proceeded across the bay). These photographs being claimant's Exhibits 5, 6, 7 and 8. Taken in the order of their numbers they show the approach of the "Indianapolis" and her necessary detour to avoid the dock in question, as testified to by the witness Burns. (R. p. 184.)

We are mindful of the inevitable dispute which arises in collision cases between opposing witnesses as to the speed, and oft-times the course, of both vessels; and that courts invariably discount heavily the evidence of witnesses based upon their experiences under the excitement of an impending collision.

The stage in this case in this respect was amply set and the characters were properly attuned thereto.

The "Kitsap" less than half an hour before had been out in this same fog; had, as we shall hereafter argue, had been proceeding at a high rate of speed; had overridden and sunk a launch and drowned a man; had seen fit to turn about to come back to her dock; and had been again sent out into the same fog. In spite of the protestations of her master, we confidently assert she was being navigated by men who

must, with ordinary *humane* instincts, have been, at least, upon some nervous tension. Her passengers and crew must have shared to a certain extent this feeling, and their perception of the facts attending upon the immediate approach of the two vessels must undoubtedly have been more or less warped thereby.

The effect of this is well illustrated in the evidence of the mate of the "Kitsap," who testified that the "Kitsap" was going about four miles an hour. (R. p. 68.) That she was running four or five miles an hour; going very slow. (R. p. 69.) Who testified on (R. p. 76) that he asked the captain if he had "hooked" her on; and that his reason was that he wanted to know *whether or not she was going full speed or going slow*; and what he was doing; and on (R. p. 77) testified: "No I do not know how fast we were going." And on (R. p. 74) that the captain was not as calm as he was before the previous accident. In fact the evidence of the mate of the "Kitsap" and of the master of the "Kitsap," shows that neither one of them knew how fast she was going; and that neither of them knew which way she was going, other than she was swinging on a port helm, not having looked at the compass or having observed surrounding land marks.

If frankness call upon us to admit that the same fog conditions and the impending collision would produce the same effect upon witnesses on the "Indianapolis," we shall certainly be entitled to claim that this want of reliability would naturally be less in the absence of the first tragedy attending the "Kitsap;" and in the fact that the "Indianapolis" had been until she entered the harbor in absolutely clear weather; and that her course was visible to her master for all practical purposes for the first mile and a quarter. Taking then into consideration the frailty of evidence as to course and speed of passenger and crew who stand in a fog and look ahead, we come to a consideration of the tangible evidence of a more reliable character as affecting the course of the "Kitsap." Four witnesses, all experienced, and one thoroughly disinterested, one a shipmaster, and one acquainted with the water front and vessels, as an officer and manager for many years, to-wit: Brydson (R. pp. 196, 197, and 198), Burns (R. pp. 181, 182 and 183), Gleason (R. pp. 229, 230 and 231), and Tucker (R. pp. 224, 225, 226, 227, 228 and 229), swear positively that they saw the "Kitsap," which they knew and recognized, passing south across the face of the Colman Dock previous to the collision in question. They were standing there in anticipation of the arrival of

the "Indianapolis;" they knew the "Kitsap;" they heard her whistle; they saw her as she passed; they remarked upon her speed among themselves; and they all say that she was going fast. Their estimates, of course, naturally do not exactly coincide; they range from ten to twelve miles an hour. The accuracy of their judgment as to her exact speed is not the vital thing; the exact course she was steering is not the vital question; if she was steering a course south of the Colman Dock, whether she was swinging or whether she was going straight across the face of the dock; in other words whether her helm was amidship or at port, or how hard aport is not the vital question; the vital question is *if she was steering the course they testified to*, or an approximate course thereto, she was making a southerly distance from her point of departure, which it was impossible for her to make up except at a high speed and that is the question which cannot be gotten away from. The appellee introduced a drawing or sketch, being claimant's Exhibit 9 in illustration of our contention as to her crossing the course of the "Indianapolis." We shall have occasion hereafter to call the court's attention to the fact that this drawing with a course marked "Course of 'Kitsap' December 14," and "ordinary course of the

‘Kitsap,’ ” is not drawn to a scale, nor does it partake of any highly technical appearance of being accurate. The course of the “Kitsap” may have been flatter; it may have been sharper; it may have been deeper; it may not have been so deep. It was not pretended at the time by counsel for cross-appellant that he could draw the exact course of the “Kitsap;” all we claimed for it is, that it illustrates *some such* course as she must have taken, in that this course went a considerable distance south of the Colman Dock and south of the course which the “Indianapolis” would have to steer from the bell buoy to the Colman Dock; and that it came north again and crossed this course a second time. We feel quite sure that if we have not made ourselves plain in this respect to the appellant, we have made ourselves plain to the Court.

The four witnesses above referred to were offered to prove the general course of the “Kitsap” south of the Colman Dock, and as nearly as they could estimate it, her speed. They were standing on the dock waiting for the “Indianapolis.” Counsel for the appellant in cross-examination tried to pin them down to exact estimates of time upon which they had not been asked to testify; which were not material from their standpoint, and which they expressly de-

clined to vouch for, but, after considerable hectoring, he managed to obtain estimates from them as to how long the "Kitsap" may have been in view.

The court knows that when a man under such circumstances is finally induced to make a guess and says a minute, half a minute or three-fourths of a minute, he is guessing pure and simple. He does not pretend to be doing anything else; he does not stand with a watch in his hand under such circumstances and count the seconds; and we submit that this evidence which is so vital to the contention of the appellant and which in the absence of any impeachment of these witnesses, would seem to be so conclusive upon their having seen what they said they saw, is compelling beyond question.

We come next to one of the witnesses of the appellant, Charles Wallace, who, was, at the time of the trial, employed by the appellant; and who is one of the two witnesses of the appellant who testified to the course of the "Kitsap" from having seen land marks (and it will be remembered that no witness testified to her course based upon having seen her compass). He testified: "I do not think I looked at the Grand Trunk Dock after we had it abreast of us. I am sure I did not." And a little later: "I do not

think you could distinguish an object more than two hundred feet." And still later: "That it was abeam and was a little closer than two hundred feet." (R. p. 331.) This witness was the mate of the "Reliance," and claims to have steered a parallel course with the "Kitsap" and to have steered upon some degree of port helm. He ties his evidence with the officers of the "Kitsap," showing that the course they claimed to have steered was such as must have taken them south of the Grand Trunk Dock, and necessarily the inference is that the course continued on the same degree of curvature, because otherwise not having looked at the compass they would not know where they were. The appellee introduced a drawing, Claimant's Exhibit "Fifteen," based upon the evidence as to the course steered by the "Kitsap" and the "Reliance," starting off Pier Four and maintaining such a course and such a degree of curvature as would bring them within one hundred feet and two hundred feet, respectively, of the Grand Trunk Dock; and they must have been within one hundred or two hundred feet according to the evidence of the witnesses in order to see the dock. This map is drawn to scale and with mathematical precision. It was identified by a civil engineer, C. W. Bronson, whose evidence appears at (R. pp. 424 and 425), and

which proves beyond contradiction that if these vessels, or either of them, steered such a course as enabled them to see the Grand Trunk Dock abeam, and one hundred or two hundred feet away, that they went south of the Colman Dock before they got on a northerly course.

In passing we desire to call the court's attention to the utter unreliability of witness Wallace with reference to the course steered. For instance he admits that no seaman or anybody else can tell how a vessel is headed when she is steering in a fog, and without looking at the compass, and when one has no objects to determine his course from. (R. p. 332.) He also admitted that his estimate of the course he steered on the day in question was based upon his having steered it at previous times; and later in answer to the question: "So that you do not know what course was actually steered?" he replied, "No sir."

Another witness, Shaw, whose evidence begins on (R. p. 318), testified to having been a passenger on the "Reliance," and that they went so far south that he could see the fireboat; and the fireboat slip is identified as being immediately adjoining the Grand Trunk Dock; and a reference to Claimant's Exhibit Four will show that it is set away into the shore, so

that the evidence of this witness would tend to finally clinch that of the witness Charles Wallace to the effect that the "Kitsap" and "Reliance," while they may have been steered upon a port helm, were not steered with a helm hard a port, but were flattening the course out so as to be proceeding practically at right angles to the water front; and Claimant's Exhibit Number Fifteen applies all the more strongly to the evidence of the witness Shaw. He further admits that his idea of the course steered would simply be an approximation along the line of a previously steered course. (R. p. 324.) The value of his evidence may further be shown by his statement, "That he could see the range light of a vessel five hundred feet in the fog; and that he could hear a man's voice a thousand feet in the fog; and that he did not look at the compass; and that he did not know what the captain of the "Reliance" did with his helm when he stopped the boat on one or two occasions. (R. p. 325.) This witness had been called upon to identify the course of these vessels and his evidence was seriously presented to the court for that purpose, and yet, on (R. p. 326) he says that he does not know what the scale is; does not know what the diameter of the proposed circle on the map was; did not know how far it would be to the end of the dock from the point of collision, and fin-

ally wound up on (R. p. 327) by saying that the course represented a curved line and he supposed that was what they were steering. Furthermore the court can see what a dramatic witness he was when at the bottom of (R. p. 319) he said he heard Captain Hansen of the "Kitsap," supposedly a thousand feet away say: "For God's sake throw that rope," and that he recognized Henry Hansen's voice. How well posted he had been as to the issue that the appellant was trying to make is very suggestively shown on (R. p. 320), where he testifies in answer to the question: "Did you notice at this time how far south she went?" "Well she seemed to go—he drifted away from the dock so it seemed to me as though he was afraid of going south."

It is in evidence in this case that the faster a vessel travels the flatter her degree of curvature will be, and this exactly explains the evidence of appellant's witnesses who base their idea of course on the day in question upon previous occasions, because she was going faster at the latter date and therefore described a larger circle.

The appellant introduced the evidence of one Lieutenant Stewart which appears at (R. p. 298) to the effect that he did not see any vessel pass the Col-

man Dock. Considering the ease with which witnesses may be produced who have not seen anything, it might be surprising that appellant did not secure more evidence of a similar character. It might be ever so truthful, but it has little, if any, weight, as the fact that a hundred men did not see a thing would not disprove the evidence of one man who did see it. This might result from inattention; lack of interest, looking the other way, and anyone of a thousand similar reasons; and the fact that he afterwards heard whistles would not prove that a vessel sounding the whistles had not previously passed down the water front even within his range of vision if he had not had occasion to look at her.

One other witness was produced by the appellant to attempt to off-set the overwhelming evidence of the appellee to the effect that the "Kitsap" did go south of the Colman Dock. The witness Hill, whose testimony begins at (R. p. 405), testified that the vessel that he saw was lying at the *west end* of the Galbraith Dock, which is Pier Three. He then corrected his evidence to say Pier Four. He did not correct it, however, to say that she was lying on the *south* side of the dock, and the evidence of the libellant in this case is that the vessel which was lying at the end of the dock was the "*Reliance*" above re-

ferred to, so that the vessel which this witness saw was evidently the "Reliance." The court will observe in reading the evidence that the "Reliance" and "Kitsap" are by a number of appellant's witnesses said to have gone out together. This witness said he did not see the "Reliance." This witness further testified at (R. p. 409) that when he saw the vessel which he did see leave her dock, she was *five hundred yards* away; and yet the appellant asks the court to believe as to every other witness in this case that you could not see more than one hundred feet or at most, two hundred feet in this dense and heavy fog. Comment on the distance of the two docks apart is unnecessary.

Before briefly taking up the question of the speed of the "Kitsap" from a standpoint of the observation of witnesses on the vessel, we wish to call the court's attention to what we deem a very much more important admission as to her speed as contained in the evidence of her master. Her master testified that this previous collision with the launch took place off the Mud Chute about three or four minutes after he left the dock the first time. (R. p. 40 and 41.) He did not see the Mud Chute, but he arrived at this problematical location from the time he had been on his course; and he says that he was proceeding at that

time under a slow bell, which is the bell he says he was proceeding under when he went out to meet the "Indianapolis." We are perfectly willing to assume that what he says to be the time is only approximately correct. The important point is that he thought and testified that at what he called a slow bell, he had made a distance away from his dock and south and around on his course to a point *approximating* the Mud Chute. We have had the distance on the water front measured by a civil engineer, and it is found that the distance from the south side of Pier Four to the Mud Chute is three thousand four hundred and seventy-two feet. (R. p. 426.) As she was going south when she started, she must have traveled at least that far north in addition to her curve. If this is Captain Hansen's estimate of where he would be under a slow bell in three or four minutes, he was traveling substantially ten miles an hour. Can we escape the conclusion that this was the speed that he was making when he testified that he thought the first collision was off the Mud Chute; because the time he had taken and the speed he made would place him there.

He also testified that he had been about a minute *on his course for Four Mile Rock*, after turning in the bay, when he stopped his engines previous to

the collision. Whether he meant exactly a minute, or substantially a minute, or even a half a minute, he must have spent *some* time on this course; and even at five miles an hour, in one minute he would travel four hundred and forty feet; therefore if he proceeded on his course northerly or northwesterly as much as a minute at five miles an hour, he had to travel from a point four hundred and forty feet south of the point of collision before he got to the place where the collision occurred and the vessel sank. If he was traveling ten miles an hour, he had to travel twice that far. Without attempting to split hairs, we cannot escape the conclusion that under his own evidence he had traveled a very considerable distance *northwesterly* to the point of collision.

We do not believe the court would be assisted by a long running commentary on the credibility of the witnesses who testified to the speed of the "Kitsap," or the speed of the "Indianapolis" at the time when they were approaching each other. They are diametrically opposed to each other and not as appellant says on page thirty-three of his brief, "all on one side." Some of appellant's witnesses claimed that the "Kitsap" was not under any considerable headway; one of them said that she was going astern, which as a matter of

fact necessarily contradicts all of the other witnesses of the appellant, because if she was going astern and the "Indianapolis" was headed for her pilot house when first seen, she would have struck forward of her pilot house when the collision occurred. In correction of the statement of appellant upon page thirty-three of his brief, we cite the evidence of Allen McDougal (R. p. 276); Penfield (R. p. 167); Walker (R. pp. 267 and 279), and Rodgers (R. p. 270). As to the accuracy and credibility of those witnesses who attempted to testify to her course and speed, we desire to draw the court's attention for the purposes of comparison to the following points. Captain Hansen said he left the dock a few minutes after 4:00. (R. p. 27.)

"Looked at the clock and it was exactly one minute past four." (R. p. 40.)

"When I backed out and came ahead I did not hear her, I thought I was safe." (R. p. 47.)

"The collision occurred around 4:39 or 4:40." (R. p. 37.)

"I looked at the clock when I came ahead on my course."

Q. "When you straightened out on your course before the collision?"

A. "Yes sir."

Q. "And it was then 4:39?"

A. "No, I left the dock at 4:35, and coming ahead it was about 4:36."

Q. "It was not when you straightened out on your course, but when you went ahead from the backing?"

A. "Yes sir."

Q. "That was the last time you looked at the clock."

A. "Yes sir." (R. p. 48.)

Q. "Did you testify before the Inspectors, 'I only looked at my watch when we backed away from Pier Four at 4:35?'"

A. "I looked at my clock. I never looked at my watch too."

* Q. "Did you so testify?"

A. "I suppose I did. I don't know." (R. p. 55.)

The witness shows that his whole idea of distance and course was based upon his estimate of time that was clapsing, and because he made that turn right along every day. And he further admits that the direction of fog signals in a fog cannot be accurately determined; and that he did not know whether the signals of the "Indianapolis" indicated that she was crossing his bows or going parallel with them. (R. p. 53.) On (R. p. 56) he admits that the estimates he figured out on this occasion were testified to very largely from previous experiences. The master

and the engineer of the "Kitsap" had an interesting discussion between themselves in connection with the fact that the master ordered the "Kitsap" to proceed at faster speed, and the reliability and accuracy of the evidence of one, or either, or both of them, is well illustrated on (R. p. 65) where the engineer after disputing the statement of the master on the witness stand in a previous hearing said: "The captain and me talked it over afterwards and I came to see that he did ring the bell."

Mr. Welfare, mate on the "Kitsap," whose testimony begins on (R. p. 65) was also a very interesting witness. He seems to have been more cautious than the captain, as appears from the way in which he advised handling the ship. (R. pp. 70 and 71.) He said on (R. p. 71) that he thought that the "Kitsap" had but little headway. He testified on (R. p. 75) that he asked the captain if he had hooked her on; meaning had he rung the jingle; and on (R. p. 76) that he wanted to know if she was going full speed or going slow and what he was doing; and at the top of (R. p. 77) that he did not know how fast they were going, and that he got his ideas from the captain; and that he knew that the "Indianapolis" was due, and ought to be coming; and that he warned the captain that the "Indianapolis" was coming and

we will have to keep a lookout for her, and that the captain told him that he was keeping her over a little so that they would be sure and clear the "Indianapolis." The question arises, if they were north of the "Indianapolis" why did they need to keep her over? He knew what the captain meant and what he meant, but when it became apparent that he was becoming dangerously frank, he took instant advantage of the suggestion of counsel and said he did not know what the captain meant.

If this estimate of his own speed is thus proven to be so worthless, how much credit is to be given his estimate of our speed?

Ole Tongerose, deckhand on the "Kitsap", on (R. p. 80), judged that they left about 4:30, because that was when the "Reliance" left, and the "Reliance" was there when they left; and he does not know when she did leave; and a little later he heard the captain say she was on her course, and then a little while afterwards he heard the "Indian." On (R. p. 80) he says he heard her about as close as he could get it about two points off the port bow; and when he saw her she was four points off the bow; and the two vessels were not meeting at right angles. He further testified that he heard the "Indianapolis"

whistle five or six times; and he heard it about five minutes before the collision. (R. pp. 86 and 87.)

If these are the things he was offered to prove and if these things are true, what of all the rest of appellant's evidence as to the time and direction of the "Kitsap's" course; and if the vessels were meeting at an angle of two points, how fast did the "Kitsap" have to move to raise the position of the "Indianapolis" from two points on the port bow to four points on the port bow?

Thomas E. Foster, whose evidence begins on (R. p. 89) was a brilliant illustration of ignorance and inaccuracy, whose evidence as to the handling of the "Kitsap" can best be commented upon by calling attention to the fact that although he had been eight or ten years to sea, yet on (R. p. 90), he says that he did not know whether the "Kitsap" was struck on the port or starboard side; and by the statement at the bottom of (R. p. 95) as illustrating his idea that she was at rest when the collision occurred, he stated that her engines had been backing four or five minutes. This was before the commissioners. On (R. p. 96) he changes the minutes to seconds. He further testified that the "Kitsap" was on her course saying: *"He must have been on his course to be going straight*

ahead." And after testifying that he knew she was going straight ahead. He first said she had no list on her and then admitted that he was not looking over the bow and said: "She might come over a little." On (R. pp. 100 and 101) he admits that he does not know what he testified to on the previous hearing.

Otho Anderson, whose evidence begins on (R. p. 101) was a fireman on the "Kitsap;" and in addition to being a general handy man, as a witness, carried the log of the engine bells in his head, as shown on (R. p. 102 and 103), before this accident took place, and before anything occurred which would naturally occur to fix it on his mind. It may be also noted that it was naturally not his business to remember the bells and yet on (R. p. 105) he undertakes to say that he could recite the bells from memory on any given trip of the boat. He explains this on (R. p. 105) by saying that he was looking for another collision.

M. D. Jackson, a witness called for the appellants, whose testimony begins on (R. p. 301) attempted to define the course of the "Kitsap" from his position on the deck of the "Reliance," saying that they completed the turn or the curve of the "Kitsap," but says that the "Kitsap" did not go south of the "Reliance;" and he further attempted to define

a previously prepared course of the "Kitsap" on appellants' Exhibit "J." Mr. Jackson is a real estate agent. Upon cross-examination he was asked if he looked at the compass and said no; and upon (R. p. 305) upon being pinned down to it, in answer to the questions, "Would you undertake to say that you could tell when she was going north after she had turned on her course there," answered, "No, I would not;" "Or west," answered "That would depend on how far I was from the harbor." He further testified that he could see the docks *for two or three minutes*, and all the time the vessel was turning. Further comment would seem to be unnecessary. Yet later on on (R. p. 306), after having identified the supposed point of collision, he admitted that he did not know how far out from the dock it was; and that he did not do anything to try to locate it; and further that he did not know how far out she steered a course on a curve. On (R. p. 307) he said that the vessels were three hundred feet apart when they began to diverge; this in a dense and heavy fog, which the appellant reiterates over and over again; and on (R. p. 308) he says that the "Kitsap" and "Reliance" were running parallel courses; and on (R. p. 309) he admits what is the foundation of all of this class of evidence, name-

ly: that he supposed she steered the same course this day that she had steered on previous occasions.

The appellant attempted to avail itself of the evidence of C. C. Kurin, whose evidence begins at (R. p. 309), and of Mr. F. L. Evans, whose evidence begins at (R. p. 312). The two witnesses contradict each other so squarely as to well illustrate the contention of the appellant that the direction of sounds in a fog is always disputed; and the sum of all of this class of evidence amounts to proving that there was a collision somewhere out in the bay, a fact which we do not dispute.

Mr. W. L. Gazzam, whose testimony with respect to the movements of the "Kitsap" appears at (R. p. 336) attempted to give the course and speed of the "Kitsap." Upon cross-examination, however, Mr. Gazzam, like every other witness who testified as to the course and direction of the "Kitsap," save only those who saw the docks and passed them on the course which is proven would take them below the Colman Dock, did not look at the compass; did not know of his own knowledge what course was being steered in the fog; and therefore proves nothing by his supposition. In fact on (R. p. 342) he testified that he rarely rides in the pilot house and knows very little about

navigation, but he did say that he saw the docks for probably *two minutes*; and if he saw the docks for *two minutes*, he had to be going parallel with their face or on a course, which was not rapidly diverging from a parallel line with these docks, because otherwise if at a rate of four or five miles an hour, Mr. Gazzam's range of vision, like all the other witnesses', would have been lost in a half a minute at the outside. He admits (R. p. 342) having seen the same Grand Trunk Dock. Mr. Gazzam testified that the two boats were making about the same speed, but he unfortunately got the "Reliance" across the bay in eighteen or nineteen minutes including one stop, or two stops, according to the evidence of appellant's witness, Shaw, (R. p. 219), the ordinary time being ten or eleven minutes. If, as appears from his evidence (R. p. 346) the ordinary time of the "Reliance" on which he was traveling to the bell buoy at Duwamish Head is ten or eleven minutes, traveling at fourteen miles an hour; taking off one minutes and not two minutes from eighteen minutes; in other words giving Mr. Gazzam the long end of his figures, the problem then is. If he covered a given course in ten or eleven minutes at fourteen miles an hour, what speed is he making if he covers that course in seventeen minutes in a dense fog. As

we figure it, the "Reliance" was traveling better than eight miles an hour as is supported by Mr. Gazzam's own evidence. *If the time he gave to the supposed point of collision is considered, the "Reliance" was making nearly her full speed; and if the two vessels were making substantially the same speed, what must be said of the "Kitsap."* The appellee respectfully submits that the foregoing resume as to the "Kitsap's" speed and course proves by facts which are not based upon mere wild guesses, but by the evidence of the witnesses who saw her from the land, and of the course she steered as determined by her position relative to the Grand Trunk Dock; of the witnesses aboard of her and aboard of the "Reliance" that she unquestionably went to some point far south of the Colman Dock; and that this evidence is not even shaken by the statements of witnesses who stood upon her deck and who one and all from Captain down never once looked at the compass; and therefore absolutely could not know what course she did steer. If she steered a course south of the Colman Dock; and especially if she steered a course which took her to a point from which she was one minute or substantially a minute in coming north to the point of collision she had to steer a course which required her to make the speed of ten to twelve miles an hour as testified by

the four witnesses who saw her pass the Colman Dock.

AS TO THE SPEED AND COURSE OF THE “INDIANAPOLIS.”

The appellant in this case realized that the safest course of procedure was to avoid as far as possible any position which assumed mutual fault; as the existence of mutual fault, would very likely lead to the conclusion that if the “Kitsap” was in fault, there was little need of looking further for the sole cause of the collision. It has accordingly strenuously bent its efforts toward upsetting the evidence of the appellee with reference to the course and speed of the “Indianapolis.”

Realizing the small degree of weight given to witnesses on the deck of vessels as to the speed of approaching vessels, as heretofore suggested, the appellant has gotten up a highly technical attack upon the only real evidence in the case, as to the course of the “Indianapolis,” and has attempted to theoretically upset the cold hard facts and in so doing has employed one H. A. Evans, as an alleged expert navigator, who introduced his evidence with an eloquent eulogy upon his own attainments and abilities, and who proceeds in the course of his

evidence to try to get away from the deadly fact that the appellants' one witness as to the *actual location* of the "Kitsap," Captain Gibbs said he found the "Kitsap" off the Colman Dock. He assumed an imaginary curved course taken by the "Indianapolis" and "Kitsap" after the collision. He also attempted to distort the evidence of Captain Penfield; and also either unknowingly or with gross carelessness misstated the distance upon the chart and the actual distance between the bell buoy and the Colman or Grand Trunk Dock, as shown by the government's scale upon the chart itself.

First as to the evidence of Captain Penfield.

He testifies that the "Indianapolis" reached the bell buoy off Duwamish Head, the entrance to Seattle harbor, in substantially clear weather at 4:33 on the afternoon of the day of collision; that he ran the engines full speed for five minutes through what was a shifting, foggy condition in which he could see over a quarter of a mile; that the course he steered was as outlined upon the map which he produced, and which *before he testified* had already had the course laid upon it by himself, plainly and fairly drawn, from the bell buoy direct for the Grand Trunk Dock. This map is a government chart, Claimant's Exhibit 4.

Captain Penfield had had thirty years' experience at sea; twenty-one years as master; and had been on this run for four years. It would seem to be not only hypercritical, but childish to attempt the palpable subterfuge which Mr. Evans attempted, after looking at this chart. He looked at the course laid on it; he considered that this master has been steering a large steamer over this course for four years, and then tried to take advantage of a slip of the tongue made *after the chart was marked* and the course laid on it, and as the course appears, which error may have occurred through the inadvertence of counsel or of the witness, which appears at (R. p. 149) when the captain was describing the course which he steers by the ship's compass and which has a quarter point easterly deviation upon the course in question; and which he said was, and which is, N.E. by E.¹ E. on the compass course. The inadvertent error discovered in reading the evidence afterwards being in the last question and answer upon the page in question where counsel appears to have asked the question "magnetic," to which the answer appears, "Yes sir." We think this court can readily understand how such an error could occur without any attempt to misstate the facts; and we fail to see how anyone could assume that a witness could hope to gain anything by producing a

chart with the course marked on it; and then intentionally dispute what he had marked. It might be plausibly argued if he had testified to a course and had *afterwards* produced a chart with a different course upon it; that the discrepancy was intentional. The court will see by reading the last two or three paragraphs on (R. p. 149) that the witness had marked a course upon the chart and designated it as N.E. by E. $\frac{1}{2}$ E. magnetic, before he answered the question, to which all of the voluminous evidence of the witness Evans is devoted.

After proceeding five minutes at full speed which carried the vessel one and one-quarter nautical miles, he put her at half speed, and during the interval of the next minute he successively slowed down and stopped her. (R. p. 143.) He had heard the whistle of the "Kitsap" when he put her under slow speed. The successive whistles of the "Kitsap" after this first one, which was slightly off the port bow, at first indicated that the vessel whistling was quite a distance away and was crossing his bow from port to starboard and apparently clearing the "Indianapolis." (R. p. 144.) And up to this time the indications were that the vessel in question, while not having the right of way, was proceeding on a course which would clear the two of any danger of collision; and

undoubtedly if the "Kitsap" had proceeded upon this course without swinging to the westward and northward, the collision would never have occurred. The next whistle of the "Kitsap" showed that she had turned and was approaching the "Indianapolis," and the engines were thereupon sent astern and within a fraction of a minute half speed astern; and the reasoning in Captain Penfield's mind clearly appears at the bottom of (R. p. 146.) He testifies that at the end of the time specified the "Indianapolis" would be practically at a stand still. (R. p. 147.) The collision occurred in the neighborhood of 4:40. This time like that of all other witnesses, under the circumstances, is an estimate, as Captain Penfield says that he did not look at the clock after 4:39.

The court will observe from the evidence that at this time the "Indianapolis" was due at the dock, if she had maintained her ordinary and regular speed across the bay.

He testified that the "Kitsap" was steering a course which had brought her south of the course of the "Indianapolis" and across the bows of the "Indianapolis" twice; and that the "Kitsap" was really the colliding force; in fact that she was coming pretty fast; and that he could see the wash upon her bow.

He gave the angle of collision as much sharper than forty-five degrees, and as approximating a head on collision. In passing we may comment upon the criticism of the appellant that we did not produce the log showing the bells which the captain gave as the "Indianapolis" approached the "Kitsap." If it will be any satisfaction to the libellant, we will admit that we did not take the time to log the bells under the imperative circumstances then commanding attention; and we imagine that if we had logged them afterwards, and had offered to use them as self-serving declarations, that the appellant would have not been slow in calling attention to our attempt to manufacture evidence; a better answer still is that an uncontradicted witness does not need corroboration. The position of the approaching vessels, and the cut in the bow of the "Kitsap," all show that the *point of impact* was something less than forty-five degrees; *and that the angle of penetration* was about forty-five degrees; and the evidence of all of the witnesses shows that the sharp steel stem of the "Indianapolis" did not enter the hull of the "Kitsap," a much lighter and wooden vessel, until it had slid along upon, *or had been scraped along* upon the hull of the "Kitsap" some two feet from bow towards stern. (R. pp. 372 and 393.) The evidence of the mechanics who re-

paired the stem and plating of the "Indianapolis" was to the effect that her stem was bent decidedly to port; and that her plating was crushed to port as would occur if the "Kitsap" had swung herself along and against the stem of the "Indianapolis." (R. pp. 270, 271 and 276.)

To this effect also was the evidence of Captain Frank Walker, a witness on behalf of the appellee, who was shown to have been a man of wide experience both as a practical sailor and navigator, and as a shipbuilder and architect. (R. pp. 269, 279, 280, 282, 290 and 291.) We desire to call the attention of the court in passing to the evidence of Captain Walker at (R. pp. 292, 293 and 294) as illustrating the contention of the appellee that if the moving force had been the "Indianapolis" and if she had had any considerable way as contended for by the appellant, a vessel of her form and size would have gone clear through the "Kitsap." Mr. Walker in his evidence also calls attention to the fact that the photographs which appellant has introduced into the record as Exhibits "E," "F," "G" and "H" are very largely pictures of damage resulting from the salvage operation; in fact Exhibit "E" shows to the court the nature of those operations and particularly the big

log which was a part of the means of handling the ship as she was raised and beached.

The evidence of the witnesses, Penfield and Jacobs, was to the effect that the "Kitsap" at the point of collision was moving quite rapidly and that she swung herself against the bow of the "Indianapolis."

Following the collision the vessels separated, but were brought together again with the bow of the "Indianapolis" held against the side of the "Kitsap" with the engines of the "Indianapolis" going ahead *dead* slow (R. pp. 165 and 170) and not simply slow as appellant states, and upon which error Mr. Evans based his imaginary curve. They remained in this position from five to ten minutes; this being, of course, only a guess in any event. That they then separated as the "Kitsap" was becoming waterlogged and sinking. The tide was at a strong ebb, flowing north. Captain Penfield testified that with the engines *dead* slow the "Indianapolis" would hardly move the "Kitsap" under the conditions; and that she could probably hardly stem the tide even if she were headed against it, there being, however, no evidence even of this suggestion of appellant, (R. pp. 170 and 171.) The first officer of the "Indianapolis," whose

evidence begins at (R. p. 173), testified that the fog was in streaks off the bell buoy and that you could see pretty well for some time; that he heard the whistles of the "Kitsap" on the port bow (R. p. 174), and then on the starboard bow; and that the "Kitsap" was coming fast (R. p. 175); that in his opinion the "Indianapolis" was stopped when the collision occurred (R. p. 176), that he knew from the trumpet on the Colman Dock that the "Indianapolis" was on her course; and that the "Kitsap" from the direction out of which she came in sight had undoubtedly been south of the course of the "Indianapolis." This witness had had thirty years' experience at sea; and had been three years on this course. He also testified upon cross-examination that he could see the wash on the bow of the "Kitsap" as she was coming ahead.

B. F. Jacobs, a witness for the appellee, was called to testify as to the whistles and as to the speed of the "Kitsap" when she loomed out of the fog. He was not called to log the course of the "Indianapolis" and expressly stated that he was paying more attention to the whistles than he was to the speed of the boats, until they got in a close proximity to the docks (R. p. 208, 210 and 212.) He testified that the "Kitsap" was making considerable speed when she appeared.

(R. p. 209.) He heard the whistles of the "Kitsap" first on the port bow and then on the starboard bow. Upon cross-examination, counsel attempted to coax him into making numerous guesses as to time and course of the "Indianapolis," and against the demur of the witness, succeeded in getting him to guess at a number of matters which he expressly disclaimed an accurate knowledge of; and now in his brief appellant attempts to discount the evidence of a credible witness because in some respects his guesses did not coincide with Captain Penfield's positive statements as to course and speed. Counsel has not succeeded in any way breaking down his evidence as to the material questions upon which he was called to testify. Captain Percival, a witness for the appellee, whose evidence begins on (R. p. 245), and who had been mate, pilot and master on the Sound for nine years, testified that as the "Kitsap" appeared out of the fog, she was swinging on her port helm hard a starboard; he had heard the whistles of the approaching "Kitsap" and had determined that the vessel was rapidly approaching on the starboard bow of the "Indianapolis." (R. pp. 246 and 247.) He states further on (R. p. 251) that the "Indianapolis" had, if anything, very little headway; and that the "Kitsap" was the moving vessel; and that the "Indianapolis" was un-

der control. This witness does not pretend to know the exact location of the "Indianapolis" when he came on deck, because he did not see the land on either side. We particularly call the court's attention to the candor and fairness of this witness as shown on (R. p. 255) and to the care with which he avoided making any absolute statement as to the "Indianapolis" having a possible slight headway; and further to the description he gave of the actual approach and meeting of the vessels, which is in accordance with the evidence of all the witnesses as to the action of the stem of the "Indianapolis" in not cutting into the hull of the "Kitsap" at once and directly as would have been the case if she had been the principal moving object and the "Kitsap" stationary. We desire to call particular attention to the statement of this witness at (R. p. 256) where he was asked: "You would not tell how the "Kitsap's" *engines* were working? answered, "No, sir, I am of the opinion, from her movements, that she was backing." This was cross-examination. Upon (R. p. 260) counsel for appellee appreciating the adroit way in which the questions had been put to the witness on (R. p. 256), in order to clear any doubt upon the matter, asked him whether or not he had referred to the engines of "Kitsap" as backing or to the boat as backing; and

to which the witness answered that he thought the *engines* were backing at the time we hit; and at the top of page 211, expressly and clearly repudiates any imputations as to the "*Kitsap*" herself backing by saying expressly that she was not. We call the court's particular attention to this because counsel for appellant was not careful in reading the evidence and in his brief inadvertently misstates the fact in this respect. Upon (R. p. 260) this witness further testified that he had not seen the bell buoy and had not paid particular attention to the exact location of the "Indianapolis" when he went on deck. As in case of the witness Jacobs, not having been called to locate the course of the "Indianapolis," upon cross-examination, counsel also attempted to snarl him up in his evidence and then to discredit him in his argument.

The appellant attempts to attack the evidence of the master of the "Indianapolis" in two ways. First by witnesses as to fog, and second by the theoretical witness Evans. He introduced the evidence of Captain A. J. Wood, the master of the West Seattle Ferry to show that the log of the ferry boat indicated that there was a dense fog in Seattle Harbor on the evening in question. Without raising the question of the competence of such evidence. We are not disput-

ing this was very largely true on the Seattle shore. The cross-examination of this witness at the top of (R. p. 315) exactly supports the contention of the appellee that it was a shifting fog, thin in one place and thick in another; and that it is thicker where the ferry crosses, a half a mile south of the Duwamish Head, than it is at the course of the "Indianapolis" steers.

He also introduced the evidence of W. C. Gilbert, who testified that he noticed no difference in the vibration of the engines of the "Indianapolis" from the time she left Tacoma harbor until he was knocked out of his chair by the collision. We note the *exact time when* he was knocked out of his chair, the inference then being that the engines ran full speed ahead until the actual collision. Will counsel for the appellant say for one moment that he believes this evidence; would he suggest to this court that a vessel like the "Indianapolis" going full speed ahead into the "Kitsap," would only have cut seven or eight feet into her light wooden hull; does he want the court to think his other witnesses testified to any such state of facts. The statement is so preposterous that no one would believe it, and yet if this witness did not know of the vibration stopping, until he was knocked out of his chair; and if, as a matter of

fact, the vibrations did stop at one time before that; and he did not notice them, what does his evidence amount to. If they stopped once and he did not notice them, they might have stopped a dozen times. He further testifies on (R. p. 115) that the fog only lifted for about four or five minutes all the way over from Tacoma to Seattle; and that it was so dense that "you could not see your hand in front of you, hardly." Does the libelant desire to contradict one of its principal witnesses, Mr. Gazzam, who at (R. p. 338) testified as follows (he being on the "Reliance" which they say left approximately at the same time with the "Kitsap"): "From 4:30 until we reached the buoy, at the time we passed the buoy it lightened a little and by the time we reached Alki Point it was *very* clear." It seems to us that Mr. Gilbert's evidence is disposed of.

The appellant produced the witness F. F. Wells, structural engineer, who traveled over from Tacoma on the "Indianapolis" and who was asked if he noticed any difference in the amount of vibration from the time she left Tacoma until the collision; and who said that he did not notice any such vibration. What we have said with reference to the witness Gilbert applies with equal force to this witness, because we do not think that counsel for the appellant

will seriously argue that the "Indianapolis" struck the "Kitsap" with her engines going full speed ahead.

We come now to the main reliance of the appellant, to-wit: Witness Evans, whose whole energy is taken up in disproving the actual observable facts by a process of induction not based upon experience, nor founded upon the actual facts in the case.

As we have heretofore pointed out, Mr. Evans attacked the chart upon which the course of the "Indianapolis" had been plotted by the captain, and because of the inadvertent use of the word magnetic on the bottom of page 149 in connection with the difference between the deviated compass course of the "Indianapolis" and the magnetic course on the chart, assumed that he could run the course of the "Indianapolis" a quarter of a point further to the northward and could thereby get the "Indianapolis" in a position where the "Kitsap" would not have crossed her course. He also, it seems to the appellee, purposely attempted to construe certain marks placed upon the chart by Captain Penfield as illustrative of places where he changed the speed of the "Indianapolis" into exact, though imaginary locations in the water. He also for some reason overlooked the fact that the chart with the extension of the

docks thereon of eight hundred feet, shows that the distance from the bell buoy to the end of the present docks is not two nautical miles. Of course, Mr. Evans may not have put the dividers upon the chart, although a man of his supposed scientific attainments should not allow counsel for one of the parties to correct him along the lines of his own business. He should, however, have done so especially when the suggestion was made by Captain Penfield at (R. p. 150) that the docks had been carried out eight hundred feet. The whole purpose of Mr. Evans in attempting to construe this evidence was to contradict Captain Penfield and is based upon a very simple problem of arithmetic, namely: Take two nautical miles, the original course from bell buoy to the shore on the Seattle side; deduct eight hundred feet for the fills and docks on the Seattle side; deduct one-fourth nautical mile for the supposed point of collision off the dock; deduct one and one-quarter nautical miles for the uncontradicted run of the "Indianapolis." We have then much less than a nautical half mile within which Mr. Evans makes all his fine deductions; and if the "Indianapolis" at the beginning of this fractional distance was running at full speed and gradually diminished until just before the collision, her average speed in the

middle of this course would not be nine and one-half miles as testified to by Mr. Evans, but would be less than that; *and her speed at the end of the course* and not her average speed at the middle of the course is the speed in question in this case, so that all of his fine house of cards falls to the ground because of lack of exactness in the premises from which he started.

We say all of this because we believe that the witness did not think that the marks in question were intended to be measured marks, but were simply illustrative of the supposed position. These were no more intended to be accurate and exact than the diagram drawn upon the chart (appellee's Exhibit Nine) illustrative of the supposed position of the "Kitsap" and her course, was intended to be exact. We make no pretense of knowing exactly how far south the "Kitsap" went or of her exact degree of curvature. It is not necessary for us to establish it with exactness. Of course, the further south she went the faster she had to go; and if she went south of the Colman Dock at all, she had to go much faster than five or six miles an hour. And this is the sum and substance of Mr. Evan's evidence with relation to the course of the "Indianapolis." We next come to his very interest-

ing calculations to prove that the Kitsap was not found where she was found, or to put it in his language to prove that while she was found as appellant's witness Captain Gibbs said "off the Colman Dock," after having traveled as her master said about a minute on a northwesterly course and with a favorable tide, this was not where the collision took place. Mr. Evans then proceeds to change the facts in the following particulars: He raises the speed of the "Indianapolis" while she had her stem against the side of the "Kitsap" from dead slow, i. e. her engines, to ordinary slow; he raises the time from ten minutes as testified to by Captain Penfield to twenty minutes; he makes no comment upon the waterlogged condition of the "Kitsap"; he makes no allowance for the time during which the vessels were separated; but in order to get the collision north of the course of the "Indianapolis," he proceeds to draw an imaginary but supposed course of curvature; and the appellant seriously asks this court to consider it, and to consider it for the purposes of disputing the known tangible evidence of where she was found and the fact that four unimpeached and supposedly fair witnesses actually saw her going south of the Colman Dock, and in face of the conclusion from the witnesses of appellant who testified

that she did not go south of the Colman Dock *because she had not done so heretofore*, but who saw no compass or land mark and in spite of the two witnesses who testified to seeing the Grand Trunk Dock, and the fire boat slip within one hundred or two hundred feet after she had passed south six hundred feet and had only gotten one or two hundred feet away from the face of the Grand Trunk Dock.

Furthermore the whole attempt to disqualify the evidence of Captain Penfield, which the appellant had no means of contradicting directly, is based upon an assumption which there is no evidence to support. The point of collision for all we know may not have been exactly a quarter of a knot off the dock, but a few hundred feet either way would make all the difference in the world in the speed of the "Indianapolis," when this difference is to be deducted out of a small fraction of a half knot of the slow end of the course. We submit that it should be borne in mind that it is not incumbent upon the appellee to prove these exact locations in the water and in the fog, and if the appellant is without the means of accurately contradicting the evidence of the appellee, that is no fault of ours, and it certainly furnishes no basis for hypothetical dis-

putes and more especially for any distortion of the actual facts, which he does seek to produce. Undoubtedly Captain Penfield's evidence of where he was after he left Duwamish Head was based upon the time and the speed which the "Indianapolis" made and no amount of argument can distort these into a statement that he plumbed his location in the water by anything else than his course and his speed.

The witness Evans was also given an opportunity to illustrate his very expert knowledge in explaining how the sharp iron stem of the "Indianapolis" failed to penetrate the hull of a light wooden vessel like the "Kitsap" when the "Indianapolis" was rushing upon her at high speed, until after the stem had slipped along the hull of the "Kitsap" two feet. This explanation is on a par with the rest of his evidence and simply shows that he is such a blind partisan as to attempt to justify any desired assumption without rhyme or reason. This fact is not open to dispute, nor is the fact that the stem of the "Indianapolis" and the plating on her port side were bent to port, although she was a strong iron ship. Counsel on page 33 of his brief seems to have forgotten that four witnesses testified positively to the fact which he there supposes

that we produced no witnesses to sustain. No better illustration of the futility of appellant's argument could possibly be hoped for than the case he cites of *Brooks against D. W. Lennox*, 4 Fed., Case Number 1952.

Coming now to the statement on page thirty-eight of appellant's brief, that Captain Penfield testified that the deviation in the compass of the "Indianapolis" was one-quarter point easterly; and that he steers his course by the compass N.E. by E. $\frac{1}{4}$ E. to make the course N.E. by E. $\frac{1}{2}$ E. magnetic. It is a matter of common knowledge that all compasses have a deviation, and Mr. Evans the expert made no attempt to deny it. But counsel asks on page thirty-eight and thirty-nine of his brief why Captain Penfield had not swung his compass in determining this course.

The futility of this question should occur to anyone in case of the master of a ship who for four years has steered this course several times a day. The very doing of this was the accomplishment of the same purpose which would be involved in swinging the compass every time he steered the course. It is true that he testified that he ran by his compass in clear weather, but he *did not say*

that he steered his ship N.E. by E. ½ E. Compass in clear weather; in fact would the court expect a witness of any intelligence at all who was capable of being a master of the "Indianapolis" to steer across the bay in clear weather with his eyes on the compass and without looking ahead; and in order to meet counsel's argument steer a course which would take him away south of his destination and then finding that it landed him south of his desired landing, to go on repeating it. To make such a suggestion is to answer it. We must assume a reasonable degree of ordinary common intelligence in any ship master who can look straight ahead. If this were a new course or the first time he tried it, it might possibly argue that he would steer directly out of the course which would take him to the destination he wanted, but we hardly believe counsel will seriously expect the court to believe that he would do it habitually or that the evidence in the case could be construed into any such fantastical proposition. We desire to call attention to the inconsistency of the appellant's position in its brief with reference to the distinction of sounds in a fog. Counsel takes both sides of the question. If it suits his purpose the witness is held to strict accountability with reference to the sounds in a fog. If it

comes to a question of two of his witnesses contradicting each other as to the sounds heard off the docks, one saying southwest and the other northwest, he explains them naturally by saying that sounds are deceptive in a fog. We think that human experience justifies the latter statement and we contend that as in the case of the witness Jacobs when counsel proposes to hold him to accountability as to a fine degree of distinction between one point and two points, that he carries criticism to a point beyond reason. (R. p. 49).

RULE SIXTEEN

Counsel for appellant in this case in his endeavor to fix the whole responsibility for the collision upon the "Indianapolis" has overlooked one of the Rules governing steamships in a fog, and its plain application to the facts in this case, and has failed to cite to the court the case of the "Beaver" "Selja" recently decided by the United States District Court for the Northern District of California, which, while, of course, not controlling upon this court, is a valuable contribution to the list of decisions establishing the principles which should be applied. Its application is apparent from the reading of the rule, which is found in Volume Two,

Federal Statutes Annotated, page 178, and which became a part of the law in its present form under the act of June 7th, 1897, Thirty Statutes at Large, 96 to 99.

“A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and navigate with caution until the danger of collision is over.”

With reference to its application to the “Kitsap,” the master of the “Kitsap” testified in answer to the question: “What, if anything, did you do with the “Kitsap” after you heard the “Indianapolis” fog whistles?” “After we heard about three whistles we stopped,” (R. p. 30) the mate of the Kitsap testified.

Q. “When did you first hear the “Indianapolis” whistle?”

A. “I first heard her whistle after I came forward and asked the captain if we were on the course yet.”

Q. “Where did you hear these whistles, what direction?”

A. “I heard them on the port bow.”

Q. “How did they sound, were they close to you?”

A. “Well, the first one or two was pretty well off, but they were getting closer right along.”

Q. "About how many points off your port bow?"

A. "Two points."

And later as follows:

Q. "What was done after you heard the 'Indianapolis' whistles?"

A. "I said to Captain Hanson, did you hear the 'Indianapolis' blowing?"

Q. "Did he say anything?"

A. "He says yes, I hear her, something like that."

Q. "Go ahead and state what is the next thing that occurred there?"

A. "Well then, I heard another whistle. I says, she is getting closer, you better stop her, captain."

Q. "What did he do, if anything?"

A. "He stopped her." (R. p. 70).

From the evidence, it appears certain that the suggestion of the court in the "Beaver"-*"Selja"* case was the practical suggestion in the mind of the mate, and that it should have been acted upon, even if there had been no previous negligence on the part of the *"Kitsap."*

Appellant will doubtless come back with the very natural argument that the same principle applied to the *"Indianapolis."* The difference between the two is this, that the Master of the *"Indianapolis"*,

although he did not stop his engines when he first heard the whistle of the "Kitsap" according to his evidence was not at that time within the meaning of the rule as illustrated in the opinion of Judge Bean in the "Beaver"- "Selja" case, or within any fair interpretation of the rule.

In other words the language of the rule "the fog signal of the vessel, *the position of which is not ascertained*" does not apply if the Master of the "Indianapolis" at that time not only ascertained her position, but ascertained it correctly and ascertained that it was proceeding at a distance and on a course, which if maintained, would have passed her far south of the "Indianapolis" when the "Indianapolis" reached the crossing point. (R. p. 156). It was only when he heard the whistle of the "Kitsap" on his star-board bow and ascertained that she had altered her course and was coming toward the "Indianapolis" that the application of the rule in question applied to the "Indianapolis"; and at that time she complied with the rule.

The appellee has no fault to find with the opinions of the various court's citations, which are found upon pages 57, 58, 59 and 60 of the appellant's brief, as they are undoubtedly well established principles

of law and more particularly as they are of a general nature and apply to the contentions of the appellee as well as to the appellant.

We think the decision of this case rests almost entirely upon the one or two questions of fact involved in the disputed evidence; and that the arguments of appellant as for instance at the bottom of page 109 and the top of page 110 of his brief amount simply to begging the question.

Most certainly if the court finds as a fact that the "Indianapolis" was "grossly at fault" the citation of authority by us would certainly fail to relieve us of the penalty for our conduct. But it would not relieve the appellant of his fault and his share in the penalty. The statement following, however, that we will not seriously contend to the contrary is equivalent to saying that we will not defend the case. We might just as seriously assert our position which is, that the Kitsap was grossly at fault, and say that we do not think the appellant will contend to the contrary.

We do, however, desire to call the court's attention to the fact that what is known as the crossing rule, and upon the basis of which the appellant contends that we violated the Rules of the Road, will not apply in a fog.

The Grenadier vs. August Korff, 74 Fed. 974.

In that Mr. Justice Butler uses the following language:

“What occurred before the signals were heard respecting the speed and navigation of the respective vessels is not deemed important. At this time each was enveloped in fog, so dense that the other could not be seen, nor her location or course be ascertained from the signals heard. They might be near together or far apart; their courses might be crossing, or opposite, or otherwise. Nothing could be determined by sight, and sound was unreliable—likely to be obstructed or deflected, and calculated to mislead.
* * * *

“The sixteenth clearly contemplates navigation under ordinary circumstances, where the vessels can see each other and thus ascertain their respective courses. Its application is impossible where the vessels are enveloped in dense fog, unable to see each other or to ascertain their respective locations and bearings.”

The reference here is, of course, to the rules as numbered at that time.

Indeed, there would seem to be no escape from this as a common sense, and therefore necessary conclusion.

If, however, counsel desires to seriously stand upon this position, it seems as if the appellee is entitled to insist that the “Kitsap” only acquired the advantage of the crossing rule, as against the “Indianapolis” by violating that rule herself and un-

doubtedly the officers of the "Indianapolis" who heard her whistles on her port bow had a right to assume that although she was violating the rules of the road as to any steamers bound to the Seattle docks, still she was apparently far enough away and proceeding upon a course which if she maintained, it would avoid a collision.

What we have said with reference to the general nature of citations applies also to the cases cited upon pages 111 and 112 of appellant's brief. If the "Indianapolis" should have been under command, shall not the same be said of the "Kitsap"? Does not the citation for instance of the *City of New York*, 147 United States, 72, apply just as much to the "Kitsap" in running down the water front already in a fog, as it does to the "Indianapolis" proceeding toward the waterfront as first in clear weather and afterwards in thickening weather, and as appellee contends, slowing her speed as she approached the denser condition.

To answer the argument on pages 113 and 115 of appellant's brief, which is simply a reiteration of the argument previously made by him, would of course involve a reiteration by us with reference thereto. The statement of all of this matter illus-

trates the fact that the appellant is so far committed to his side of this case as to make it impossible that he should fairly consider the contention of the appellee; and the appellee is content in so far as the merit of the case is concerned to rest the decision thereof upon the facts which present themselves from physical evidence and which do not depend upon the contradictory opinions of witnesses upon the deck of other ships.

Nothing which the appellant has said has tended to move the "Kitsap" one foot from the spot where she was found. Nothing has tended to dispute the evidence of the witnesses who saw her pass south of the Colman Dock; nothing has tended to dispute the forced admission of her master that he proceeded approximately one minute on his course in a north-westerly direction to the point of collision from a point somewhere south thereof; nothing of a tangible character has tended to show that any witness who saw the "Kitsap" and observed her movements knew what course she did steer from any of the observations or physical evidences upon which an accurate human judgment could be based. The fact that she steered one course in open weather on one day does not in our opinion tend to prove with the slightest weight what course she steered some other

day in a fog from a different point, and from a different angle of departure at an unknown degree of helm; at a speed which was confessedly raised by the engineer in obedience to a disputed order from the wheel house.

And this is the sum and substance of the evidence of all on board the Kitsap.

DAMAGES.

It is under this head that the appellee feels most strongly inclined to resist the contention of the appellant. We subscribe fully to the statement "That restitution for the loss sustained and no more is the rule for determining the amount of damages in case of partial loss." The position which the appellant takes in this case, however, is not the restitution for loss sustained and no more. It is stipulated in this record that the net earnings of the Kitsap were \$50.00 per day. It is a part of the record in this case that the appellant was the owner of a spare boat.

We cheerfully concede the law as stated by this court in the State of California, 54 Federal, 404, with reference to the employment of a spare boat; and here also the appellant is met by the facts.

He stipulates this loss was the loss of what the Kitsap earned, fifty dollars per day; he attempts to say that the charter value of his spare boat is twice that sum, without, however, establishing that there is any market charter value for such a boat or any boat in the port of Seattle; he overlooks the following language at page 407 in the case cited, to-wit: "And it is our opinion that the value of the use of the injured vessel during the time of actual necessary detention is the proper measure of the amount to be allowed." The evidence in this case showed that there was no market charter value of the spare boat "Hyak". She had been under charter to the appellee a year previous, but she had no charter at the time in question; she had none offered or available during any of the time in question.

In this connection the Supreme Court of the United States in in the case of *The Conqueror*, 166 United States, Page 110; 41 L. ed., at page 944, uses the following language:

"That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably sup-

posed to have been, lost, and the amount of such profits is proved with reasonable certainty. In one of the earliest English cases upon this subject (*The Clarence*, 3 W. Rob. Adm. 283), it was said by Dr. Lushington that 'in order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount'. * * *"

And at page 945 further says:

"The difficulty is in determining when the vessel has lost profits and the amount thereof. The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.

In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention. *The Mayflower*, Brown, Adm. 376; *The Transit*, 4 Ben. 138; *the Emilie*, 4 Ben. 235."

The only fair basis of loss to the appellant in this case is the loss which we caused him to suffer, if we are the party in fault. He was making fifty dollars per day with the *Kitsap*. During one hundred and thirty-nine days he was deprived of this

profit. (We say he was deprived of it, when as a matter of fact he was not deprived of anything because he used a boat which was idle and which was without charter, and thereby avoided the loss). The court, however, says, and we think justly, that if he furnishes another vessel, which does the work that we shall not be allowed to take advantage of his forehandedness in this particular.

But what does the appellant desire to do? He desires to make us pay him a profit of One Hundred per cent. out of this accident. He says you have lost my boat; I was making Fifty Dollars a day with her; I have a boat which will take her place and which will earn me Fifty Dollars a day, and I will ask you to pay me twice as much money as I would have made if this accident had not occurred.

The insistence by the appellant upon this unconscionable and, we think, outrageous demand has prompted the appellee to stand strictly upon our technical legal rights with reference to another item of damage claimed by the appellant. It is nowhere shown in this record that the appellant, or any person, or corporation a party to this record, or even named, or known has been put to any loss or damage in the matter of salving the "Kitsap" and we dispute

the right of the appellant to recover for the salvage item upon the ground that there is no proof of interest in the appellant or in anyone for raising and salving her.

We have no desire to split hairs for the principle of subrogation as between owner and underwriter, but we respectfully maintain that those principles are not invoked by the facts or the record in this case. The fact that S. B. Gibbs, represented some underwriters, (who they are; what their insurance was; whether they were actual underwriters and for how much, being entirely absent from the record) we maintain cuts no figure, nor do we agree that if a volunteer sees fit to raise a sunken ship and return her to the owner and does it gratuitously that thereby the owner *ipse facto* can recover from one who was responsible for sinking her. If he shows that the salvor does it and claim salvage, undoubtedly a different case is made.

The trouble with appellant's contention is that he desires the court to supply by inference, evidence which is missing, and we most respectfully submit that in want of any evidence in support of actual damage to the owner or of subrogation, that the recovery allowed by the court below for the salvage item was erroneous.

In conclusion we submit that the evidence in this case overwhelmingly shows that the "Kitsap" was fully and clearly responsible for all of the loss and damage which occurred and that the appellee is entitled to recover its full damage and loss from the appellant as prayed for in the court below and as respectfully submitted to this court; and that in any event the appellee is entitled to be relieved upon the case made from any contribution to the so-called salvage expense.

Respectfully submitted,

IRA BRONSON,

Attorney for Appellee.

tional Citation: "The Dever," the Portland Asiatic S.S. Company vs. San Francisco & Portland S.S. Co. , " 197 Fed. Page 866; being advance sheets No. 5 published October 3, 1912.

No. 2130

United States Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff in Error.

vs.

NATIONAL BANK OF COMMERCE,
a Corporation,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

Lowman & Hanford Co., Seattle

FILE

RECEIVED

DEC 9 - 1911

No.

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

NATIONAL BANK OF COMMERCE,
a Corporation,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

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*In the District Court of the United States for the Western
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,	}	
a Corporation,		
<i>Defendant.</i>		

NAMES AND ADDRESSES OF COUNSEL.

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E. S. McCORD, Esq.,
1309 Hoge Building, Seattle, Washington. Attorney for
Defendant in Error.

*United States Circuit Court Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,		
<i>Defendant.</i>	}	

COMPLAINT.

For a cause of action against the defendant the plaintiff states:

I.

That the defendant is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the United States relating to the organization of national banks, and engaged in such banking business as a national bank at the city of Seattle, in said Western District of Washington.

II.

That during the years of 1907, 1908 and 1909, one M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said times this plaintiff deposited, and caused to be deposited with the defendant, large sums of money to the credit of the said McCoy, to be by him used solely for the purpose of making payment of the expenses which he might be authorized to incur for the plaintiff as such Examiner and Special Disbursing Agent.

III.

That said deposits were so made with said defendant as a Government depository, and in accordance with the statutes of the United States, and the regulations of its Treasury Department relating to deposits and disbursements of public moneys.

IV.

That said McCoy did, at various times as hereinafter set forth, illegally, fraudulently, and without any authority from this plaintiff, draw checks on the defendant aggregating in amount the sum of Fifteen Thousand One Hundred and Twenty-nine and $\frac{81}{100}$ (\$15,129.81) Dollars, payable to the order of fictitious payees, and thereafter at various places in the State of Washington and in the State of Montana, forge the endorsements of the names of such fictitious payees, and afterward procured from various banks in said states for his own use the sums of money for which said checks were so drawn.

V.

That the defendant, when said checks were presented to it from time to time, wrongfully and without authority from this plaintiff, charged the respective amounts thereof against the said deposits of this plaintiff.

VI.

That a list of said checks showing their respective dates, amounts and names of payees, is hereto attached, marked exhibit "A" and by this reference made a part of this complaint.

VII.

That said forgeries were not discovered by this plaintiff until on or about September 30, 1909, prior to which time of discovery, this plaintiff, relying upon the representations of the said defendant that said endorsements so made by said McCoy were genuine, had by mistake credited the said defendant with the said aggregate amount of said checks.

VIII.

That upon making such discovery, plaintiff notified the defendant thereof, and thereafter, to-wit, on March 5, 1910, demanded of and from the defendant the payment of said sum of \$15,129.81, which had been so credited to the defendant by mistake on account of said forged endorsements.

IX.

That defendant refused and still refuses to make payment of said amount, or any part thereof.

X.

That there is now due and owing the plaintiff from the defendant on said account, the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon since March 5, 1910, at the rate of 6% per annum, which the defendant neglects and refuses to pay.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon at the rate of 6% per annum from March 5, 1910, until paid, and for its costs and disbursements herein.

ELMER E. TODD,

United States Attorney.

W. G. McLAREN, ..

Assistant United States Attorney.

The United States of America,
Western District of Washington—ss.

W. G. McLaren being first duly sworn on oath deposes and says: That he is an assistant United States Attorney for said Western District of Washington, and is attorney for the plaintiff herein and makes this verification for and in its behalf; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

W. G. McLAREN.

Subscribed and sworn to before me this 22d day of December, 1910.

(Seal)

W. D. COVINGTON,

Deputy Clerk U. S. Circuit Court, Western District of Washington.

Exhibit "A".

No.	Date.	Payee.	Amount.
1	Oct. 14, 1907	Albert Peterson	\$ 20.00
2	" 14, "	Nels Anderson	20.00
3	" 14, "	Wm. Jager	60.00
4	" 14, "	H. Berggren	47.50
5	" 31, "	F. L. Day	28.00
6	" 31, "	G. Hoge	28.00
7	" 31, "	Frank Engberg	96.00
8	" 31, "	Chas. Lund	78.75
9	" 31, "	J. D. King	62.00
10	" 31, "	F. M. Clark	62.00
12	Nov. 30, "	F. L. Day	52.50
13	" 30, "	G. Hoge	52.50
14	" 30, "	Frank Engberg	180.00
15	" 30, "	Chas. Lund	150.00
16	" 30, "	J. D. King	60.00
17	" 30, "	F. M. Clark	60.00
19	Dec. 31, "	F. L. Day	54.25
20	" 31, "	G. Hoge	54.25
21	" 31, "	Frank Engberg	186.00
22	" 31, "	Chas. Lung	155.00
23	" 31, "	F. M. Clark	62.00
24	" 31, "	J. D. King	62.00
26	Jan. 10, 1908	F. L. Day	17.50
27	" 10, "	G. Hoge	17.50
28	" 10, "	Frank Engberg	60.00
29	" 10, "	Chas. Lung	50.00
30	" 13, "	J. D. King	26.00
31	" 13, "	F. M. Clark	26.00
43	May 6, "	John Jabelson	27.50
44	" 6, "	John S. Cole	36.00
45	" 31, "	J. D. King	62.00
46	" 31, "	F. M. Clark	62.00
47	" 31, "	A. J. Whitney	54.25

No.	Date.	Payee.	Amount.
48	May 31, 1908	H. M. Benson	\$125.00
49	" 31, "	C. A. Thrapp	150.00
50	June 10, "	H. M. Benson	48.75
51	" 10, "	C. A. Thrapp	72.00
52	" 23, "	J. E. Scherer	78.00
53	" 23, "	H. M. Benson	63.75
54	" 30, "	J. D. King	69.33
55	" 30, "	F. M. Clark	60.00
56	" 30, "	A. J. Whitney	54.25
57	" 30, "	H. A. Moore	63.00
58	" 30, "	D. H. Sullivan	12.25
59	" 30, "	Geo. D. Cook	14.00
60	" 30, "	F. W. McCulley	14.00
61	" 30, "	S. F. Cady	12.25
62	" 30, "	H. M. Benson	54.00
2	July 31, "	J. D. King	100.00
3	" 31, "	F. M. Clark	62.00
4	" 31, "	Geo. D. Cook	62.00
5	" 31, "	F. M. McCulley	62.00
6	" 31, "	A. J. Whitney	62.00
7	" 31, "	H. A. Moore	279.00
8	" 31, "	D. H. Sullivan	54.25
9	" 31, "	S. F. Cady	54.25
10	" 31, "	H. M. Benson	248.00
12	Aug. 31, "	J. D. King	100.00
13	" 31, "	F. M. Clark	62.00
14	" 31, "	Geo. D. Cook	62.00
15	" 31, "	F. W. McCulley	62.00
16	" 31, "	A. J. Whitney	62.00
17	" 31, "	H. A. Moore	279.00
18	" 31, "	D. H. Sullivan	54.25
19	" 31, "	S. F. Cady	54.25
20	" 31, "	H. M. Benson	248.00
22—A	Sept. 8, "	A. Feters	7.85
22—B	" 30, "	J. D. King	100.00

23	Sept. 30, 1908	F. M. Clark	\$60.00
23	" 30, "	F. M. Clark	60.00
24	" 30, "	Geo. D. Cook	60.00
25	" 30, "	F. W. McCulley	60.00
26	" 30, "	A. J. Whitney	60.00
27	" 30, "	H. A. Moore	270.00
28	" 30, "	D. H. Sullivan	52.50
29	" 30, "	S. F. Cady	52.50
30	" 30, "	H. M. Benson	240.00
1	Oct. 31, "	J. D. King	100.00
2	" 31, "	F. M. Clark	62.00
3	" 31, "	H. A. Moore	279.00
4	" 31, "	Geo. D. Cook	62.00
5	" 31, "	F. W. McCulley	62.00
6	" 31, "	A. J. Whitney	62.00
7	" 31, "	H. M. Benson	248.00
8	" 31, "	(Blank)	54.25
9	" 31, "	S. F. Cady	54.25
11	Nov. 30, "	J. D. King	100.00
12	" 30, "	F. M. Clark	60.00
13	" 30, "	Geo. D. Cook	60.00
14	" 30, "	F. W. McCulley	60.00
15	" 30, "	A. J. Whitney	60.00
16	" 30, "	H. A. Moore	270.00
17	" 30, "	D. H. Sullivan	52.50
18	" 30, "	S. F. Cady	52.50
19	" 30, "	H. M. Benson	240.00
21	Dec. 31, "	J. D. King	100.00
22	" 31, "	F. M. Clark	62.00
23	" 31, "	Geo. D. Cook	62.00
24	" 31, "	F. W. McCulley	62.00
25	" 31, "	A. J. Whitney	62.00
26	" 31, "	D. H. Sullivan	54.25
27	" 31, "	S. F. Cady	54.25
28	" 31, "	T. E. Lynch	24.50
29	" 31, "	Claude J. Perret	24.50

No.	Date.	Payee.	Amount.
30	Dec. 31, 1908	H. M. Benson	\$276.00
31	" 31, "	H. A. Moore	279.00
1	Jan. 5, 1909	J. D. King	12.90
2	" 5, "	F. M. Clark	8.00
3	" 8, "	Geo. D. Cook	16.00
4	" 8, "	F. W. McCulley	16.00
5	" 8, "	A. J. Whitney	16.00
6	" 8, "	D. H. Sullivan	14.00
7	" 8, "	S. F. Cady	14.00
8	" 8, "	H. M. Benson	48.00
9	" 8, "	H. A. Moore	72.00
14	Mar. 31, 1909	J. D. King	35.48
15	" 31, "	F. M. Clark	22.00
16	" 31, "	Geo. D. Cook	18.00
17	" 31, "	F. W. McCulley	18.00
18	" 31, "	A. J. Whitney	18.00
19	" 31, "	Joe Mikel	14.00
20	" 31, "	E. M. Bassett	14.00
21	" 31, "	Geo. K. Cooper	14.00
22	" 31, "	Chas. Paine	14.00
23	" 31, "	H. M. Benson	82.50
24	" 31, "	A. C. Junkin	72.00
1	Apr. 30, "	J. D. King	100.00
2	" 30, "	F. M. Clark	60.00
3	" 30, "	Geo. D. Cook	60.00
4	" 30, "	F. W. McCulley	60.00
5	" 30, "	A. J. Whitney	60.00
6	" 30, "	Joe Mikel	52.50
7	" 30, "	E. M. Bassett	52.50
8	" 30, "	Geo. K. Cooper	52.50
9	" 30, "	Chas. Paine	52.50
10	" 30, "	A. C. Junkin	270.00
11	" 30, "	H. M. Benson	300.00
13	May 31, "	J. D. King	100.00
14	" 31, "	F. M. Clark	62.00

No.	Date.	Payee.	Amount.
15	May 31, 1909	Geo. D. Cook	\$62.00
16	" 31, "	F. W. McCulley	62.00
17	" 31, "	A. J. Whitney	62.00
18	" 31, "	Joe Mikel	54.25
19	" 31, "	E. M. Bassett	54.25
20	" 31, "	Geo. K. Cooper	54.25
21	" 31, "	Chas. Paine	54.25
22	" 31, "	A. C. Junkin	279.00
23	" 31, "	H. M. Benson	310.00
25	June 30, "	J. D. King	100.00
26	" 30, "	F. M. Clark	60.00
27	" 30, "	Geo. D. Cook	60.00
28	" 30, "	F. W. McCulley	60.00
29	" 30, "	A. J. Whitney	60.00
30	" 30, "	Joe Mikel	52.50
31	" 30, "	E. M. Bassett	52.50
32	" 30, "	Geo. K. Cooper	52.50
33	" 30, "	Chas. Paine	52.50
34	" 30, "	H. M. Benson	300.00
35	" 30, "	A. C. Junkin	270.00
1	July 31, "	J. D. King	100.00
2	" 31, "	F. M. Clark	62.00
3	" 31, "	Geo. D. Cook	62.00
4	" 31, "	F. W. McCulley	62.00
5	" 31, "	A. J. Whitney	62.00
6	" 31, "	Joe Mikel	54.25
7	" 31, "	E. M. Bassett	54.25
8	" 31, "	Geo. K. Cooper	54.25
9	" 31, "	Chas. Paine	54.25
10	" 31, "	A. C. Junkin	279.00
11	" 31, "	H. M. Benson	310.00
13	Aug. 31, "	J. D. King	100.00
14	" 31, "	F. M. Clark	62.00
15	" 31, "	Geo. D. Cook	62.00
16	" 31, "	F. W. McCulley	62.00

No.	Date.	Payee.	Amount.
17	Aug. 31, 1909	A. J. Whitney	\$62.00
18	" 31, "	Joe Mikel	54.25
19	" 31, "	E. M. Bassett	54.25
20	" 31, "	Geo. K. Cooper	54.25
21	" 31, "	Chas. Paine	54.25
22	" 31, "	A. C. Junkin	279.00
23	" 31, "	H. M. Benson	310

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington. Dec. 22, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA	} No. 1933.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE, a Corporation,	
<i>Defendant.</i>	

ANSWER.

Comes now the defendant in the above-entitled action and answering the complaint of the plaintiff, for cause of answer says:

I.

Defendant admits the allegations contained in paragraph one of the complaint.

II.

Answering the second paragraph of the complaint, this defendant admits that during the years 1907, 1908 and 1909

one P. M. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

III.

Answering the third paragraph of the complaint this defendant admits that said deposits were made with this defendant, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

IV.

Answering the fourth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the complaint this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

VI.

Answering the sixth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VII.

Answering the seventh paragraph of the complaint this defendant says that it has neither knowledge nor information

sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VIII.

Answering the eighth paragraph of the complaint this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

IX.

Answering the ninth paragraph of the complaint this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof.

X.

Answering the tenth paragraph of the complaint this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant on said account the sum of \$15,129.81, or any other sum or sums whatsoever.

For a further and first affirmative defense to said complaint this defendant alleges:

I.

That during the years 1907, 1908 and 1909 the plaintiff deposited with the defendant various and considerable sums of money to the credit of one M. P. McCoy, as Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States, with instructions to pay checks drawn against said deposits by the said M. P. McCoy as such Examiner and Special Disbursing Agent; that at the end of each month the account so created in favor of the said McCoy was regularly balanced by the defendant and the vouchers returned to the plaintiff and a statement of account was rendered both to the said McCoy and to said plaintiff

monthly during the entire time that the plaintiff carried said account in favor of the said McCoy with this defendant. That the plaintiff did not, within sixty days after the return to the plaintiff of the checks drawn by the said McCoy against said account, notify the defendant that the checks so paid were forgeries. That by reason of such failure to so notify the defendant of said forgeries within sixty days after the return of the paid checks, the plaintiff is barred and estopped from maintaining this action.

For a further and second affirmative defense to plaintiff's complaint this defendant alleges:

I.

That the deposits so made by the plaintiff with this defendant in favor of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, were made in the usual and customary manner, as deposits are generally, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay checks drawn by the said McCoy against such deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks, and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy, showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any

checks by reason of forgeries or otherwise, until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of the said McCoy and upon the rendition of statements of his account, to have examined the said account and to have promptly notified the defendant of the alleged forgeries, if any there were, and that by reason of plaintiff's failure to so notify the defendant of such forgeries within a reasonable time after the said checks were paid, the said plaintiff is barred and estopped of any right it may have had to maintain this action for the recovery of the money prayed for in the complaint.

WHEREFORE defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

Ralph S. Stacey, being first duly sworn, upon oath deposes and says that he is Second Vice President of the National Bank of Commerce of Seattle, the defendant in the above entitled action; that he has read the within and foregoing answer, knows the contents thereof, and that the same is true, as he verily believes.

RALPH S. STACEY.

Subscribed and sworn to before me this, the 11th day of February, A. D., 1911.

(Seal)

J. N. IVEY,

*Notary Public in and for the State of Washington, Residing
at Seattle.*

Copy of within answer received and due service of same acknowledged this 11th day of February, 1911.

ELMER E. TODD,
W. G. McLAREN,
Attorneys for Plaintiff.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Feb. 11, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	
<i>Defendant.</i>	

DEMURRER.

I.

Comes now the above named plaintiff and demurs to the first affirmative defense of the defendant herein, for the reason and upon the grounds that said affirmative defense does not state facts sufficient to constitute a defense to said action.

II.

And plaintiff demurs to defendant's second affirmative defense for the reason and upon the grounds that said defense does not state facts sufficient to constitute any defense to said action.

ELMER E. TODD,
United States Attorney.

W. G. McLAREN,
Assistant United States Attorney.

Received a copy of the within demurrer this 23d day of Feb., 1911. Kerr & McCord. Attorneys for Defendant.

Indorsed: Demurrer. Filed U. S. Circuit Court, Western District of Washington, Feb. 23, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA	}	1933.
vs.		
NATIONAL BANK OF COMMERCE.		Filed Sept. 21, 1911.

ORAL DECISION ON DEMURRER TO AFFIRMATIVE
DEFENSES.

The United States prosecutes this action to recover a sum of money, being the aggregate amount of numerous checks issued by a disbursing agent against a deposit account subject to his checks in the defendant bank, which is an authorized depository of government money. A series of frauds was practiced by issuing checks payable to the order of fictitious payees, these were endorsed by the disbursing agent using the fictitious names, other banks then received and cashed them and passed them on to the defendant, and by that method the disbursing agent obtained and misappropriated the money.

The defendant pleads as a defense that during the period of time in which the checks were issued and paid, it regularly rendered monthly statements of account to the government and with each statement returned the checks which had been paid during the preceeding month, and that by failing to report the bad checks with business promptness, the action is barred by laches. The answer contains two separate affirmative defenses but they are alike, except that, the first one alleges that the government failed to report the bad checks within a period of sixty days. The demurrer is aimed at both of these defenses.

If these checks came to the defendant bank through other banks the defendant became obligated, by business rules and bank rules, to promptly report any ground for rejecting the checks, or for reclaiming the amounts paid thereon. I doubt very much whether it would have recourse at this time against the banks from whom the checks were received, even if the

government should prevail in the action. The right to reclaim is probably barred by the lapse of time. There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses resulting from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured, before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obligated to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. Therefore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender of his checks that the bank has paid, according to the rule of honesty and fair dealing, the depositor becomes bound to look at the returns and report any error promptly. The rule between individuals having mutual running accounts is that, an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant

as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The Court sustains the demurrer to the first affirmative defense and overrules it as to the second.

C. H. HANFORD

United States District Judge.

Indorsed: Oral Decision on Demurred to Affirmative Defenses. Filed U. S. Circuit Court, Western District of Washington, Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*In the Circuit Court of the United States for the Western
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,		
<i>Defendant.</i>		

ORDER.

The above entitled cause having come on for hearing in open court on the 18th day of September, 1911, on the demurrer of the plaintiff to each of the two separate affirmative defenses of the defendant herein, plaintiff appearing by Elmer E. Todd, United States Attorney, and W. G. McLaren, Assistant United States Attorney, and defendant appearing by Kerr and McCord, its attorneys, and the Court having heard the argument of counsel thereon, and being in all things fully advised;

It is hereby ordered that the demurrer of the plaintiff to the first affirmative defense of the defendant, be, and the same is hereby sustained;

To which action of the Court the defendant then and there excepted, which exception is hereby allowed.

It is further ordered that the demurrer of the plaintiff to the second affirmative defense of the defendant be, and the same is hereby overruled;

To which action of the Court the plaintiff then and there excepted, which exception is hereby allowed.

Done in open court this 21st day of September, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court Western District of Washington, Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE, a Corporation,		
<i>Defendant.</i>		

AMENDED ANSWER.

Comes now the defendant in the above entitled action and filing its amended answer to the complaint of the plaintiff, for cause of answer, says:

I.

Defendant admits the allegations contained in paragraph one of the complaint.

II.

Answering the second paragraph of the complaint, this defendant admits that during the years 1907, 1908 and 1909, one P. M. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

III.

Answering the third paragraph of the complaint, this defendant admits that said deposits were made with this defendant, but denies each and every other allegation in said paragraph contained and each and every part thereof.

IV.

Answering the fourth paragraph of the complaint, this defendant says that it has neither knowledge nor information

sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the complaint this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

VI.

Answering the sixth paragraph of the complaint, this defendant says it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VII.

Answering the seventh paragraph of the complaint, this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VIII.

Answering the eighth paragraph of the complaint, this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

IX.

Answering the ninth paragraph of the complaint, this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof.

X.

Answering the tenth paragraph of the complaint, this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant the sum of \$15,129.81, or any other sum or sums whatsoever.

And for a further and first affirmative defense to the complaint, this defendant alleges:

1. That the deposits so made by the plaintiff with the defendant in favor of P. M. McCoy as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Special Examiner and Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise, until the 5th day of March, 1910. That it was the duty of plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account, to have examined said account and to

have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had promptly been made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy, the defendant is precluded from asserting any claim that it may have had against the various banks which forwarded the checks in question to the defendant for payment, and that by reason of plaintiff's failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

For a further and second affirmative defense to the complaint, this defendant alleges:

1. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy, as Special Examiner of Surveys, was authorized to make and pay on behalf of the United States.

WHEREFORE defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD.

Attorneys for Defendant.

Indorsed: Amended Answer. Filed in the U. S. District Court, Western District of Washington. Mar. 12, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933-C
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE, a	
corporation,	}
<i>Defendant.</i>	

REPLY TO AMENDED ANSWER

Comes now the plaintiff and for its reply to the first affirmative defense in defendant's amended answer herein, denies each and every allegation therein contained.

II.

Replying to the second affirmative defense, plaintiff denies that the money sued for in this action, or any part thereof, was expended and used in payment of claims against the United States or at all.

ELMER E. TODD,

United States Attorney.

W. G. McLAREN,

Assistant United States Attorney.

Received a copy of the within Reply this 12th day of March, 1912.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Reply to Amended Answer. Filed U. S. District Court, Western District of Washington, Mar. 13, 1912. A. W. Engle, Clerk, By S. Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

TRIAL

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by W. G. McLaren, and the defendant represented by E. S. McCord, the jury being called all answer to their names, all being present in their box, this cause proceeds by the plaintiff resting its cause and the defendant moves for a non-suit, and the Court having duly considered the motion and being sufficiently advised grants said motion.

And now at this time upon motion of the plaintiff the case is reopened and the cause proceeds by the introduction of documentary evidence and examination of witness on behalf of the plaintiff until the close thereof.

Whereupon the jury is discharged from further consideration of the cause.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

PETITION FOR NEW TRIAL

Comes now the plaintiff herein by Elmer E. Todd, United States Attorney, and by W. G. McLaren, Assistant United States Attorney, and moves the Court to grant a new trial in the above entitled cause, upon the following grounds, to-wit:

That error in law occurred at the trial of said cause, then and there duly excepted to by plaintiff herein, which error consisted in granting a motion of non-suit against the plaintiff at the close of plaintiff's case.

This petition is based upon the records and filed herein.

ELMER E. TODD,
United States Attorney.

W. G. McLAREN,
Assistant United States Attorney.

Received a copy of the within Petition this 20th day of March, 1912.

KERR & McCORD,
Attorney for Defendant.

Indorsed: Petition for new Trial. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 22, 1912, A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No.1933-C
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

ORDER DENYING MOTION FOR NEW TRIAL.

This matter having heretofore come on regularly for hearing on the 17th day of June, 1912, before C. H. Hanford, Judge of the above entitled court, upon plaintiff's motion for a new trial, plaintiff appearing by W. G. McLaren, United States Attorney, and the defendant appearing by Kerr & McCord, its attorneys, and the court having heard the arguments of counsel therein, and being in all things fully advised;

IT IS HEREBY ORDERED, That said motion of plaintiff for a new trial herein, be, and the same is hereby denied;

To which ruling of the court the plaintiff then and there fully excepted, and the exception is hereby allowed.

C. H. HANFORD, Judge.

Order Denying Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, June 27, 1912.
A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
VS.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

JUDGMENT OF NON-SUIT.

This matter having heretofore come on regularly for trial before the above entitled court and a jury, plaintiff appearing by Elmer E. Todd, United States Attorney, and by W. G. McLaren, Assistant United States Attorney, and the defendant appearing by Kerr & McCord, its attorneys, and the court having heard the evidence submitted in behalf of the plaintiff, thereupon the defendant made a motion for the dismissal of said cause, on account of the insufficiency of the plaintiff's evidence, and the court having heard the arguments of counsel thereon, thereupon granted said motion, and thereafter on the 17th day of June, 1912, a motion for a new trial by the plaintiff coming on regularly for hearing and having been denied by the court, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That plaintiff take nothing by its said action, and that the said action be and the same is hereby dismissed;

To which judgment of the court the plaintiff excepts, and the exception is hereby allowed.

C. H. HANFORD, Judge.

Indorsed: Judgment of Non Suit. Filed in the U. S. District Court, Western Dist. of Washington, June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

STIPULATION.

It is hereby stipulated by and between the parties hereto, by their respective attorneys of record herein, that the plaintiff may have thirty days from the 18th day of June, 1912, in which to prepare and settle its bill of exceptions herein.

W. G. McLAREN,
Attorney for plaintiff.
KERR & McCORD,
Attorneys for defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
<i>Defendant.</i>		

ORDER EXTENDING TIME FOR FILING BILL OF
EXCEPTIONS.

Upon motion of the United States Attorney, and pursuant to the written stipulation of the parties hereto now on file herein, providing for the extension of time to the plaintiff for signing, allowing and filing of bill of exceptions herein, the court having considered the same and cause being shown therefor;

IT IS HEREBY ORDERED, That the time for the preparation, signing, allowance and filing of bill of exceptions of the above named plaintiff in the above entitled cause, is hereby extended for a period of thirty days from and after June 18th, 1912.

Dated this 27th day of June, 1912.

C. H. HANFORD, Judge.

Indorsed: Order Extending Time for Filing of Exceptions.
Filed in the U. S. District Court, Western Dist. of Washington,
June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933-C
<i>Plaintiff,</i>	
vs.	
THE NATIONAL BANK OF COM-	
MERCE,	
<i>Defendant.</i>	

STIPULATION.

It is hereby stipulated by and between the parties hereto by their respective attorneys of record herein, that the plaintiff may have up to and including August 26, 1912, in which to prepare, file and serve its bill of exceptions herein.

Dated this 15th day of July, 1912.

W. G. McLAREN,
Attorney for Plaintiff,
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 17, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
VS.		
THE NATIONAL BANK OF COM- MERCE.		
<i>Defendant.</i>		

ORDER.

On motion of the United States Attorney, and pursuant to a written stipulation of the parties hereto now on file herein, providing for the extension of time of the plaintiff for preparing, filing and serving its bill of exceptions herein, the court having considered the same and good cause being shown therefor;

IT IS HEREBY ORDERED AND CONSIDERED, That the time within which the plaintiff may prepare, file and serve its bill of exceptions herein, be, and it is hereby extended and enlarged to and including the 26th day of August, 1912.

Dated this 17th day of July, 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 17, 1912. A. W. Engle, Clerk.
By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
vs.		
THE NATIONAL BANK OF COM-		
MERCE, a corporation,		
<i>Defendant.</i>		

ORDER.

Upon motion of the United States Attorney, and the above named defendant, by its attorneys, Kerr & McCord, consenting thereto, good cause therefor being shown;

IT IS HEREBY ORDERED AND CONSIDERED, That the time within which plaintiff may prepare, file and have certified its bill of exceptions herein be and it is hereby extended and enlarged to and including the 31st day of August, 1912.

Done in open court this 24th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. Dist. Court, Western Dist. of Washington. Aug. 24, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
VS.		
NATIONAL BANK OF COMMERCE,	}	
<i>Defendant.</i>		

STIPULATION.

It is hereby stipulated by and between the above named parties, through their respective undersigned attorneys of record herein, that an order may be entered authorizing and directing the Clerk of the above entitled court to stamp and file plaintiff's exhibit "G" herein, as of date March 12, 1912, when the same was offered in evidence in the trial of the above entitled cause, in order that a correction may be made of the inadvertent omission to properly stamp, mark and file said exhibit at the time the same was so offered and received in evidence.

Dated this 29th day of July, 1912.

W. G. McLAREN,
United States Attorney.
KERR & McCORD,
Attorneys for defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 30, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933-C
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
<i>Defendant.</i>		

ORDER AUTHORIZING CLERK TO MAKE A NUNC
PRO TUNC FILE, STAMP AND MARKING OF
PLAINTIFF'S EXHIBIT "G."

It appearing to the court that in the trial of the above entitled cause in the above entitled court on March 12, 1912, plaintiff's exhibit "G" was offered in evidence by the plaintiff and admitted in evidence by the trial court, and that by an inadvertent oversight said exhibit was not stamped, marked or filed by the Clerk of the court so as to show that the same was so received and admitted in evidence; now, therefore, on motion of the United States Attorney and upon the Stipulation of the parties now on file herein;

IT IS HEREBY ORDERED, That the Clerk of the above named court be, and he is hereby authorized, directed and ordered to mark said exhibit "G" as having been admitted and filed in evidence in the above entitled cause on said March 12, 1912, in order that the record of said exhibit being admitted in evidence may be correct.

Done in open Court this 30th day of July, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 30, 1912. A. W. Engle, Clerk.
By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a corporation,		
<i>Defendant.</i>	}	

MOTION.

Comes now the United States by W. G. McLaren, United States Attorney, and moves the court to enter an order herein certifying the accompanying exhibits as plaintiff's exhibits "B," "C," "D," "E" and "F," offered in evidence on the trial of this cause, and rejected by the court; and certifying and authorizing and directing the Clerk of this court to transmit to the Circuit Court of Appeals for the Ninth Circuit, said rejected exhibits, and plaintiff's exhibits "A" and "G," as a part of the bill of exceptions herein, when the same shall be filed.

This motion is based upon the records and files herein, and upon the accompanying stipulation.

W. G. McLAREN,
United States Attorney.

Indorsed: Motion. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 22, 1912. A. W. Engle, Clerk.
By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a corporation,		
<i>Defendant.</i>		

STIPULATION.

It is hereby stipulated and agreed by and between the above named parties, through their respective undersigned attorneys of record herein, that an order may be entered herein certifying as a part of the bill of exceptions herein and directing the Clerk of the above named court to transmit to the Circuit Court of Appeals for the Ninth Circuit, plaintiff's original exhibits "A" and "G" herein, and certifying as a part of the bill of exceptions herein and directing the Clerk to transmit to said Circuit Court of Appeals for the Ninth Circuit, plaintiff's exhibits "B," "C," "D," "E," and "F," as exhibits offered in evidence by plaintiff in the trial of said cause, and rejected by the court.

This stipulation is executed for the purpose of the hearing of this cause in said Circuit Court of Appeals on a writ of error, and for the reason that the alleged forgery of papers in said exhibit "A" is at issue in this cause, and all of said exhibits are claimed by the plaintiff to be in the handwriting of one McCoy and are difficult of reproduction.

Dated at Seattle, Washington, this 1st day of Aug., 1912.

W. G. McLAREN,

U. S. Atty.

KERR & McCORD,

Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 22, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western Wistrict of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,		
<i>Defendant,</i>	}	

ORDER.

Upon the motion of the United States Attorney, it appearing to the court that plaintiff's exhibits "A" and "G" received in evidence on the trial of this cause, and plaintiff's exhibits "B", "C", "D", "E" and "F", offered in evidence and rejected by the court, are claimed by the plaintiff to be in the handwriting of one McCoy, and that the alleged forgery by said McCoy of the papers comprising plaintiff's exhibit "A" is in issue herein and that an inspection of said exhibits and rejected exhibits will be aidful to the Appellate Court in the determination of this cause on writ of error, and the parties consenting thereto;

IT IS HEREBY ORDERED, that the papers marked plaintiff's exhibits "B", "C", "D", "E" and "F", be placed in the custody of the Clerk of this court for safe keeping, and designated as the exhibits offered in evidence by plaintiff on the trial of this cause and rejected by this court;

IT IS FURTHER ORDERED, That upon the settlement and certification of the bill of exceptions herein, said rejected exhibits "B", "C", "D", "E" and "F", and the exhibits marked

plaintiff's exhibits "A" and "G", be certified as a part of said bill of exceptions, and that all the originals be transmitted to the Circuit Court of Appeals with the printed record herein as part of said bill of exceptions.

Done in open court this 22d day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Aug. 22, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE,

Defendant.

No. 1933—C.

PLAINTIFF'S PROPOSED CERTIFICATE TO BILL OF EXCEPTIONS.

I, Edward E. Cushman, United States District Judge for the Western District of Washington, holding court in the Northern Division of said district, in which the above entitled cause was tried, do hereby certify that the above entitled cause was tried before Cornelius H. Hanford, then United States District Judge for said Western District of Washington, who has since duly and regularly resigned his said position as such judge, which said resignation has heretofore been duly and regularly accepted, and do hereby certify and authenticate the following matters and the deposition and exhibits herein referred to or hereto attached as all the evidence, exhibits and

other material facts, matters and proceedings in said cause, not already a part of the record therein, and now constitute the same a bill of exceptions herein.

EDWARD E. CUSHMAN,
United States District Judge.

*In the United States District Court for the Western District
of Washington, Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933—C.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	} Defendant.

BE IT REMEMBERED that heretofore and on to-wit, March 12, 1912, the above entitled cause came regularly on for trial in the above court, and before the Honorable C. H. Hanford, District Judge, sitting with a jury,

The plaintiff appearing by W. G. McLaren, Esq., Assistant United States Attorney;

The defendant appearing by E. S. McCord, Esq., of Messrs. Kerr & McCord, its attorneys and counsel;

A jury having been duly empaneled and sworn to try the cause, and counsel for plaintiff having made his opening statement to the jury, counsel for defendant reserving his opening statement, thereupon the following proceedings were had and done, to-wit:

MR. McLAREN: Will the Clerk hand me the deposition and the checks and the exhibits?

MR. McCORD: Do you want me to help you read it, Mr. McLaren, the questions?

MR. McLAREN: Yes, if you will, Mr. McCord. You will find my copy on the desk there, if you want to.

Gentlemen, this is the testimony I am reading to you. We took the deposition of this Mr. McCoy, whom I have just told you about, over in Spokane a few weeks ago, before the United States Commissioner at Spokane. I am reading to you now the answers which he gave in response to the questions which I put to him at that time, and there is also in this deposition the examination that Mr. McCord made of him in behalf of the defendant bank. If you will read the questions, Mr. Cord, I will be obliged to you.

Counsel thereupon read the deposition of M. P. McCoy, a witness on behalf of the plaintiff, taken before Denton M. Crow, a United States Commissioner in and for the Eastern District of Washington, at his office in Spokane, Washington, beginning on February 19, 1912, which reading and the proceedings had in connection therewith were as follows:

M. P. MCCOY, a witness on behalf of the plaintiff, being first duly sworn, on oath deposes and says as follows:

DIRECT EXAMINATION

BY MR. McLAREN:

Q Your name is M. P. McCoy, is it?

A Yes sir.

Q You were formerly in the government service?

A Yes sir, as examiner of surveys for the General Land Office.

Q What was your official title?

A Examiner of Surveys and Special Purchasing Agent.

MR. McLAREN: "Disbursing Agent" that should be, Mr. McCord.

Q Where were your headquarters?

A Seattle.

Q During what period of time did you occupy that position?

A From about 1900 until about two years ago.

Q About November, 1909?

A Yes sir.

Q You held that position continuously during that time?

A Yes sir.

Q What other important position, if any, did you hold prior to that period?

A I was a member of the Geological Survey for the Interior Department.

Q For about how long?

A For about ten years before that.

Q What were your duties as examiner of surveys and special disbursing agent, what was the nature of your work?

A The public lands are surveyed by contract, by deputy surveyors, and by business was to inspect their surveys in the field after their finishing their work—checking it up, in other words, to see if it was correct.

Q About how wide a territory did your duties cover?

A Well, I was in the States of Washington, Oregon, Idaho and Montana.

Q And you say that your headquarters were at Seattle?

A Yes sir.

Q What was it necessary for you to do, Mr. McCoy, in order to go around examining these public—these surveys of public lands, what did you have to do?

A To inspect the surveys in the field, which necessitated transportation and assistants and subsistence for the assistants.

Q You were authorized by the Government to employ men for that purpose?

A And to incur all these expenses.

Q Were some of these surveys made in the State of Washington?

A Yes sir.

Q Where, for instance?

A Well throughout the state.

Q You got your instructions from Washington, D. C.?

A Yes sir.

Q Were these instructions given to you for each particular survey, or were they in the nature of general instructions which you were to follow out?

A There were general instructions and sometimes special instructions.

Q Under the general instructions, did you have your own option as to the order in which you took up the examination of the different surveys?

A Yes sir.

Q What arrangement was made relative to the payment of the bills that you might incur under your authority for the performance of your duties?

BY MR. McCORD: Q Were these instructions in writing?

A Yes sir.

BY MR. McLAREN:

Q What became of these instructions, Mr. McCoy?

A I burned them something like two years ago, when this trouble began, I burned all my field notes and note books and all things of that kind. I had a trunk full and I burned them.

Q Can you give us, briefly, the arrangements you had with the Government, whereby this money was to be paid for labor, or for services, or material, which you might incur?

MR. McCORD: I object as that is not the best evidence and no proper foundation has been laid for the introduction of secondary evidence.

MR. McCORD: I object to that.

THE COURT: I overrule the objection.

Q I will ask you this question, Mr. McCoy—From where did you get your instructions regarding the payment of this money?

A From the Commissioner of the general land office.

Q Were they oral, or in writing?

A Written.

Q These written instructions, you still have them?

A No sir.

Q What became of them?

A I burned them.

Q I will ask you what your instructions were, as to how you were to pay these men?

MR. McCORD: I object, as it is not the best evidence; asking for the contents of a written instrument; there is not shown any reason why the originals cannot be produced. The best evidence would be the files in the Land Office at Washington, or a copy of them.

MR. McCORD: I make that objection, Your Honor.

MR. McLAREN: The testimony shows the originals were burned, Your Honor. I think any secondary evidence is competent.

(Discussion.)

THE COURT: The next best evidence to the originals would be an examined or approved copy. I will sustain this objection.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

Q How were you to pay them?

A I was to pay them as disbursing agent.

Q I mean by check or by cash?

A Well laterly I paid everything—I guess during this period in dispute, I guess, I paid everything by check.

Q On what banks were your checks drawn?

A The National Bank of Commerce of Seattle.

Q You had an account there?

MR. McCORD: I move to strike out the testimony as not

responsive to the question, he asked how he was instructed to do and he answered how he did it.

MR. McCORD: I waive that, he answered yes.

A Yes sir, I had an account with the National Bank of Commerce as Special Disbursing Agent.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

MR. McCORD: I object to that question, Your Honor, for the same reason. That is a conclusion as to whether he drew it in accordance with his instructions. The instructions would be the best evidence.

THE COURT: I overrule the objection. He may testify as to what he did.

MR. McCORD: I ask an exception.

THE COURT: Exception allowed.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

A Yes sir.

Q Now, Mr. McCoy, I will ask you to examine this bundle of checks, which I hand you, and state whether, or not, they were issued by you while you were in the employ of the Government.

A Yes sir.

Q On each check that is your signature, M. P. McCoy, Examiner of Surveys and S. P. A.?

A Yes sir.

Q Sp A? Special Disbursing Agent?

A Yes sir.

Q Mr. McCoy, what is the meaning of the marginal notation, Voucher Number 6, or Voucher number so and so, on the check, what does that refer to?

A In making my quarterly statement, or rendering my quarterly account to the General Land Office, I submitted a voucher for each check, up until along about in September, or October, or November, 1909.

Q 1908 you mean, Mr. McCoy?

A Yes sir, it was in 1908, from that time on I used a new form of pay-roll that covered the pay-roll expenses, but I still used the voucher plan for sustenance and transportation.

Q And supplies?

A Yes sir.

Q Examine these checks again, Mr. McCoy, are the names of the payees real or fititious persons in each instance?

A Fictitious.

Q That is, there were no such persons?

A No sir.

Q Does this apply to each of them to whom these checks were made out?

A Yes sir.

Q Examine the endorsements on the back, Mr. McCoy, and state whose individual endorsement is on the back of these checks, if you know.

A I do.

Q Are these endorsements, one or more on each check, are these the endorsements of real persons or fictitious persons?

A Fictitious persons.

Q Did the Government receive any services, or supplies or anything of value in exchange for these checks?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

MR. McCORD: Exception.

THE COURT: Exception allowed.

A No sir.

Q Did you receive the money on these checks, in each instance?

A Yes sir.

Q For the amount of the check?

A Yes sir.

Q So far as the appearance of these checks go, Mr. McCoy, are they made out in the same form and in the same manner

as you made out checks to real persons for real services rendered?

A They are.

Q That is, they are apparently regular on their face, are they not?

A Yes sir.

Q I believe I asked you if you made the endorsements on the back yourself?

A Yes sir.

Q Take, for instance, the first check, October 14, 1907, number one, payable to Albert Peterson, you had no such person as Albert Peterson rendering services at that time?

A No sir.

Q You endorsed it Albert Peterson and J. D. King?

A Yes sir.

Q And that way you received the money yourself?

A Yes sir.

Q That statement of fact is true of each check?

A Yes sir.

MR. McLAREN: I offer in evidence this bundle of checks, as plaintiff's Exhibit "A".

MR. McCORD: I object as incompetent, irrelevant and immaterial and the instruments not properly identified.

THE COURT: The objection is overruled.

MR. McCORD: Exception, Your Honor.

THE COURT: Exception allowed.

Checks referred to admitted in evidence and marked Plaintiff's Exhibit "A".

MR. McLAREN: At this time, Mr. McCord, I would like to submit the checks to the jurors, so that they may follow the testimony.

(Addressing the jury and exhibiting checks to the jury.)

These are the checks that have just been testified to. They are not quite in the order they were. If you will kindly keep them as they are. Each month is separated into a smaller package by itself. The voucher number that was referred to

in Mr. McCoy's testimony you will find in the upper left hand corner. Just pass those among you, will you, please?

(The jury examined checks embraced in Plaintiff's Exhibit "A".)

Q You got these blank checks from the National Bank of Commerce when you opened up your account?

A Yes sir.

Q Did the cancelled checks come back to you, Mr. McCoy, or were they sent by the bank to the Department?

A They did not come back to me.

Q Now while you were—During the period that is covered by these checks, you were doing some actual work for the Government, were you not, in the performance of your duties?

A Yes sir.

Q How often were you required to send in reports to the department in Washington?

A Weekly.

Q Did you send in weekly reports during this period covered by these checks in evidence?

A Yes sir.

Q I believe you testified that these checks, so far as appearance goes, are the same as real checks issued to real persons by you?

A Yes sir.

Q Now you spoke, a moment ago, Mr. McCoy, about a voucher system that was prevalent between you and the Department. I will ask you now to take this bundle of vouchers and examine them, these for the—marked for the month of October, 1907. I will take voucher number six as an example. This purports to be signed by Albert Peterson, for services rendered of the amount of twenty dollars, from October 5th, 1907, to October 14, 1907, and down below that is the signature of M. P. McCoy approving the same—Is that a genuine or fraudulent voucher?

A Fraudulent.

Q You signed the name Albert Peterson?

Q Then you approved it, with your own signature, as actually rendered to the Government for services?

A Yes sir.

Q Now will you go through the list of vouchers I hand you, for the month of October, 1907, and state whether or not they correspond with the voucher number noted on the margin of the checks for that same month—You have checked over these vouchers for the various months covered by the fraudulent checks shown as Exhibit "A"?

A Yes sir.

Q These vouchers are the vouchers referred to on the margin of the checks?

A Yes sir, they are.

Q How often did you send these vouchers to the Department?

A Quarterly.

A Every three months?

A Yes sir.

Q I now hand you another document, certificate for the month of October, 1907, is that your signature, M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q That refers, does it not, to the individual vouchers that you have just examined for that month?

A Yes sir.

Q That is a statement that you sent in as a part, or a summary of the quarterly account?

A Yes sir.

MR. McLAREN: I now offer in evidence, as plaintiff's Exhibit "B" the vouchers just testified to by the witness as having been sent in by him, quarterly, to the Department at Washington, D. C., for the following months; October, 1907;

MR. McCORD: And so on. I object to each of them as incompetent, irrelevant and immaterial and for the further reason that they show, in the light of the witness's testimony that they are all fraudulent.

MR. McLAREN: If the Court please, the very basis of this suit is that the checks were fraudulent and as a circumstance tending to rebut any evidence of negligence on the part of the Department at Washington, we purpose to show by those vouchers that they were apparently regular, that they complied in every respect with the departmental regulations, practice and custom, that there was nothing so far as the conduct of M. P. McCoy's accounts, contents of his accounts and reports and vouchers, to indicate to the Department of the United States that the fraud was being perpetrated at the time.

MR. McCORD: I don't think it makes any difference, Your Honor. I think it is wholly immaterial, irrelevant and incompetent whether he sent any vouchers or whether he didn't. The question is the liability on this check.

THE COURT: I will sustain the objection at the present. If the evidence is necessary you may offer it again in rebuttal.

MR. McLAREN: I would like to make a suggestion while the matter is fresh in Your Honor's mind. That is this: The defendant sets up in one of its affirmative defenses that if the government had been as careful as it should have been in checking up his work it would have detected this fraud at once, or at least after the first report was sent in. Now, the very purpose of this is to rebut that identical charge. If those reports were regular in every respect, then there was nothing to put us upon our guard or notice. The Court will allow us an exception.

THE COURT: I will allow an exception. If the evidence is material at all, it is material in rebuttal of the defendant's defense.

MR. McLAREN: Very well.

Q Mr. McCoy, state whether, or not, it is true that these vouchers, just introduced in evidence, were in accordance with the usual and regular method of handing in vouchers that was in use between you and the Department at the time that they were sent in?

MR. McCORD: I make the same objection to that, Your Honor.

MR. McLAREN: It may be stricken out by consent.

Q Is there anything in the—You say that, along about October, 1908, the Department changed this system of vouchers?

MR. McCORD: What do you mean by that?

MR. McLAREN: It just means that instead of the voucher plan, it was done by pay-rolls system.

MR. McCORD: What date was that made?

MR. McLAREN: October 8, 1908.

Q Examine these vouchers for October, 1908, and see if that was the new or the old system that was employed—

MR. McCORD: I make the same objection to that, Your Honor. It is referring to the vouchers which were not admitted in evidence.

THE COURT: Objection sustained.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

MR. McCORD: These same questions I suppose will all go out there, won't they, Mr. McLaren?

MR. McLAREN: I am just checking it down to each point. You better ask the question each time and have the Court's ruling on it.

Q That is for sustenance?

A Yes sir.

Q You retained the individual voucher system for supplies and material?

A Yes sir.

Q How is it, Mr. McCoy, that no vouchers are found for the last two months' issue of fraudulent checks, that is, the months of July and August, 1909—did you ever send in any vouchers for those two months?

THE COURT: I will sustain the objection.

Q It is true, is it not, that the vouchers that you sent in

for all of the other months were apparently regular and were in the usual form and manner?

THE COURT: Objection sustained.

MR. McCORD: Q When were you arrested?

A September, 1909, about September 1st.

Q You say, Mr. McCoy, that you sent in statements to the Department quarterly, will you examine these—Referring, Mr. McCoy, to the voucher for October, 1908, and the other vouchers covered by the fraudulent period, whom did you say these vouchers were sent to?

A To the Commissioner of the General Land Office.

Q And were sent quarterly?

A Quarterly.

Q Now will you explain, Mr. McCoy, what these accounts are, which I hand you, and which are signed by M. P. McCoy, special disbursement account?

A That is an account current for the quarter.

Q Covering the period from October 1st, 1907, to September 31st, 1907?

A Yes sir.

MR. McLAREN: Mr. McCord, that should be December 31st, the quarter commencing October 1st.

MR. McCORD: It is September here.

Q When you sent these quarterly account current in which you say you did quarterly, did you, or did you not, transmit with them the individual vouchers covering that same period?

A Yes sir.

Q Take the next one, from January 1st, 1908, to March 31st, 1908, is that your signature?

A Yes sir.

Q The same is true as to that?

A Yes sir.

Q The same is true as to all the vouchers down to a certain point?

A Yes sir.

Q Now calling your attention to the account current from July 1st, 1908, to September 30th, 1908.

A It is not true of that one. That is not the same thing I had in mind.

Q Take up the one, running from October 1st, to December 31st, 1908, and examine the leaflets on the inside, the outline of expenditures, the first item, October 31st, is the pay-roll—That was the pay-roll system?

A Yes sir.

Q Now examine all of these quarterly accounts current, which I hand you, they are all signed by yourself, are they not, as special disbursing agent?

A Yes sir.

Q These were sent in by you quarterly?

A Yes sir.

Q And, so far as their form is concerned, they were in due and proper form as was the customary practice of the Department?

A Yes sir.

Q Did these vouchers for expenditures, and also the pay-roll vouchers referred to in each of these accounts current, include these fraudulent checks, Exhibit "A"?

A Yes sir.

MR. McCORD: Do you want to offer those?

MR. McLAREN: Yes, I offer in evidence now as Plaintiff's Exhibit "C" the quarterly accounts current as follows: October 1st, 1907, to December 31st, 1907; January 1st, 1908, to March 31st, 1908; April 1st to June 30th, 1908; and so on down to June 30th, 1909.

MR. McCORD: I object to them as incompetent, irrelevant and immaterial.

MR. McLAREN: The Court, I presume, will make the same preliminary ruling?

THE COURT: The same ruling.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

Q Mr. McCoy, you sent in no quarterly account for the period after June 30th, did you?

A No sir.

Q The quarterly account was not yet due at the time you were arrested, is that the reason?

A Yes sir.

Q Is there anything on the face of these quarterly accounts, or upon the individual vouchers or pay-rolls vouchers that indicates any irregularity, or that indicates the practice, or I should say the fraudulent practice or scheme that you were carrying on?

MR. McCORD: I object to that as calling for the conclusion of the witness, that being the very thing that the jury is to pass upon, and I object on the further ground that it is incompetent, irrelevant and immaterial, and not the best evidence.

MR. McLAREN: It raises practically the same question, Your Honor, as to the regularity of the reports he was sending in.

THE COURT: Objection overruled. I will sustain that.

MR. McLAREN: Beg Your Honor's pardon.

THE COURT: I will sustain the objection.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

Q State what that paper is.

A An account current.

Q For the period ending when?

A September 30th, 1907.

Q Beginning July 1st, 1907?

A Yes sir.

Q Any fraudulent items included in that account current?

A There were.

Q None of them covered by these checks—I will change the form of that question—Is that the usual form for the quarterly account that was in use?

A Yes sir.

Q Can you tell, from an examination of it, whether or not any of these items were improperly allowed?

A Not from an examination of this alone, I would have to have the checks that correspond and then I could tell.

MR. McLAREN: I offer plaintiff's Exhibit "D", a quarterly account.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial and not properly identified.

MR. McLAREN: That is offered, Your Honor, for the purpose of comparison of the regular quarterly account that the witness was sending in with the fraudulent one covered by those checks.

THE COURT: I will sustain the objection.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

Q You are living in Spokane, Mr. McCoy?

A Yes sir, I am.

CROSS-EXAMINATION

BY MR. McCORD:

Q How long did you say that you occupied the position of examiner of surveys and special disbursing agent?

A I had the position of examiner of surveys for about nine years, and during four or five years of that time I was special disbursing agent.

Q Prior to the time that you became special disbursing agent, who attended to that duty of disbursing?

A I did the disbursing. I paid the expenses of the men and rendered my account to the General Land Office and was reimbursed by check from the Interior Department.

Q Who advised you in the first instance?

A The Department advised me in the first instance, of what was necessary.

Q You advanced your own money?

A Yes sir.

Q After that time you adopted the system—

MR. McLAREN: You don't mean that he adopted the system, the office adopted the system, of course.

Q After you became disbursing agent and also examiner of surveys, I will ask you where you maintained your office, if you had one?

A I had no office.

Q You attended to the surveys in Washington, Idaho and Montana?

A Yes sir.

Q Did the Government have any other agent, or assistant but you in the transaction of this business?

A No sir.

Q Did they have any other person, or individual or agent upon the ground to assist you in doing this work, or to check your accounts?

A Do you mean, now, assistants who I employed myself?

Q Employed by the Government.

A Well they were employed by me for the Government.

Q Who did you employ?

A My assistants in the field?

Q Yes sir.

A Well, I supposed—I employed assistants to assist me in making the examination of the surveys.

Q Did the Government employ any other men to aid you?

A No sir.

Q In checking your accounts as special disbursing agent—Did the Government check your accounts?

A The Department have special distributing agents—their usual custom.

Q They sent men to Seattle to examine them or do it at Washington?

A At the General Land Office at Washington.

Q Were they out here, at any time, by any body?

A Not that I am aware of.

Q How did they detect your fraudulent scheme?

A Mr. Good, I forget his initials, a special agent of the Land Office, discovered it there in Montana.

Q You were not checked up in your field work, or in your agents' work by anybody until shortly before you were arrested during the whole period of time that you were in the service of the Government, is that right?

A That is right.

Q How many surveys did you attend to—about, in a general way, about how much money did you expend legitimately in the service of the Government between 1900 and 1909?

MR. McLAREN: I object to that as incompetent, irrelevant and immaterial and also as calling for a conclusion of the witness.

THE COURT: The objection is overruled.

A I don't remember.

Q Give it to me approximately.

A Without looking up the records, I could not say.

Q In the year 1900, when you went to work for the Government in the capacity of examiner of surveys, until the time of your arrest in 1909, state approximately how much money you expended legitimately for the Government, how much per year would you estimate it?

MR. McLAREN: I make the same objection.

THE COURT: The objection is overruled.

MR. McLAREN: I ask an exception to each of those rulings.

THE COURT: Exception allowed.

A Well, I could not approximate it without looking over my—

Q Well, about how much business were you doing—You can tell about how much you would do in a year—I am not trying to trap you into anything.

A If I could give you an approximate statement, I would gladly do so, but without going over the records, I don't see how I could do so.

Q As much as five thousand dollars?

A No sir.

Q One half of that, twenty-five hundred dollars?

A No sir, nothing like that.

Q One thousand a year, would you say?

A The very outside limit would be one thousand dollars, I should say.

Q At any time, did the Government send any one else, so far as you know, to check up your work and see whether this money had been legitimately expended?

A No sir.

Q You have misunderstood the question, Mr. McCoy, have you not?

A It is only a surmise on my part, but I think there was a survey over in the extreme northeast part of Montana, over which several claimants were in litigation, and I think possibly that it was reported that I had not been on the ground to make my examination.

Q What did this work consist of, examining of surveys?

A The Government has public lands throughout these states and they make surveys of them.

Q This is done by United States Deputy Surveyors?

A Yes sir.

Q For the Government?

A Yes sir.

Q What did you do?

A Before the Government would accept it, I was sent into the field to make an examination of the survey, whether it was in acceptable form, whether it was correctly done.

Q Did you go out and run the lines over and resurvey it?

A I was to approximate ten per cent of the lines run by the party.

Q As much as ten per cent?

A Yes sir.

Q You were supposed to hire assistants to do that?

A Yes sir.

Q Surveyors?

A Yes sir.

Q Now, Mr. McCoy, you have identified a bunch of checks here, plaintiff's Exhibit "A", how do you know that these checks are the ones that you issued fraudulently—How can you tell?

A By recognizing my handwriting.

Q Every one is a different one, is it not?

A Yes sir.

Q And each individual check has a different signature—Do you mean to tell me that, from an examination of these checks that you can tell which ones you forged and which ones the signatures are legal?

MR. McLAREN: I object to the question as assuming that there is a different payee for each check, which is not the case. There were only twenty-nine different payees in the checks, Your Honor, but the checks themselves number over approximately a hundred.

MR. McCORD: I think the question is a proper question, Your Honor, to show how he got at this.

MR. McLAREN: I withdraw the objection.

A I identify these from my own signatures on the check.

Q When did you do that?

A At the time the check was issued.

Q When this list—When these checks were selected out, did you select them?

A No sir.

Q Who did?

A I couldn't tell you.

Q Did you go over the various checks that had been returned, with any body in Washington and assist him in picking the forged checks, that is, those that you forged?

A No sir.

Q You did not?

A No sir.

Q You have only made a cursory examination of these checks today, have you not?

A Yes sir.

Q You have not taken up each one individually and gone through them?

A Yes sir, each check.

Q Have you examined the signature on each one?

A Yes sir.

Q I would just like to have you tell me how you can remember five years after each one of these was taken which are genuine and which are not.

A Well, I know that, during the time that these were issued, that I issued nothing but fraudulent checks.

Q Did you issue, at any time during the period from 1907 to 1909, anything but fraudulent checks—You don't mean that?

A None except those that were payable to myself.

Q From 1907 to 1909 you did nothing then—you did not issue a single check that was valid?

A Except those to myself.

Q Except the two hundred and seventy dollars a month?

A Yes sir, my salary.

Q Everything else was fraudulent?

A Yes sir.

Q You did no work?

A I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q How much did you pay out in that way?

A I am unable to state.

Q About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A I don't think I could even approximate it.

Q Would you say that you had expended five thousand, one third of that?

A No sir.

Q About four thousand dollars?

A About a couple of thousand dollars.

Q You have no way of arriving at that estimate?

A No sir, I have no records.

Q You think that you have spent about a couple of thousand, or it may be more?

A It may be more or it may be less.

Q It may have been as high as five thousand dollars?

A I don't think it was as high as five thousand.

Q As much as four thousand?

A I don't think it was over a couple of thousand.

Q What were you doing—You say that you paid some men for services rendered, and that you paid it out of your own money—Do you know of any of the men that you paid it to?

A No sir, I do not.

Q Can't you recall any of them?

A No sir.

Q What work did they do for which you paid them?

A Some were chainmen and some were flagmen and some were teamsters and some of them were stage drivers and some of them livery stable people.

Q You did go over onto the different surveys, during the period from 1907 to 1909, to September, 1909, you did carry on the checking of these surveys?

A Only a part of them. I did a few of them.

Q You were on all of them, were you not, with the exception of the one in northern Montana?

A No sir.

Q How many all together?

A I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.

Q You made up reports on these various surveys and sent them in to the Government?

A Yes sir.

Q These reports showed that you had run the lines on at least ten per cent of the surveys, the deputy surveyor's work?

A Yes sir.

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

A No sir, on a few of them.

Q On others you did part of the work and certified that you did it all.

A Yes sir.

Q On all of them, with the exception of in Northern Montana, you did some work?

A No sir.

Q What others?

A Well, in quite a majority I did not examine in the field at all.

Q Didn't do any field work at all?

A No sir.

Q You had nobody do it?

A No sir.

Q You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A No sir, not a single man.

Q Not a single man?

A No sir.

Q Where did you keep this money, at Seattle?

A No sir, on the ground. That is, wherever I happened to be making examinations of surveys.

Q What sort of a report would you send in with the vouchers, would you draw a plat showing the survey?

A No sir, I would send in the field notes covering the ground.

Q You would send in the field notes you had gotten from the deputy surveyor's work?

A I didn't get them from the deputy surveyor, I got them from the Surveyor General's office.

Q You used the same notes in sending them in?

A Yes sir.

Q If you had done the work individually, they would not have checked with the work in the Surveyor General's office, would they—If you had made these surveys and run your own lines, it would not have checked correctly with the work in the Surveyor General's office, would it?

A No sir.

Q In checking, did you simply try to run over the lines made by the deputy surveyor on the ground and find his monuments?

A Yes sir.

Q And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A They were not copied, they were faked, we made our—

Q They were taken from the Surveyor General's office?

A The only data we had was taken from the Surveyor General's office.

Q They were reproductions of his notes?

A No sir.

Q You went to the Surveyor General's office and copied them?

A Yes sir.

Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well, now then, how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

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Q Didn't do any field work at all?

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Q You went to the Surveyor General's office and copied them?

A Yes sir.

Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well, now then, how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I

would take my own field notes and my reports would be exact copies of my own field notes.

Q Wherever you found the monuments made by the surveyor, in those cases the notes would be identical, but in those notes that you faked from the notes in the Surveyor General's office—

A So far as the monuments and as to the topography, they were not the same.

Q When you faked the notes you were not the same?

A It is seldom that any two men write up the same notes after going over a certain line.

Q Now then, these checks that you draw, where did you cash them, Mr. McCoy?

A At different places around over the country.

Q Tell me how you would do it, take the first check for Albert Peterson, for twenty dollars—

A May I see the check, please?

(Exhibit "A" shown witness.)

Q The one on the top there, the back of the check shows—

MR. McLAREN: For the benefit of the jury, the check referred to now is October, 1907, the first one.

A That I cashed it through the National Bank, or the Columbia Valley Bank of Wenatchee.

Q Did you take it there yourself?

A No sir.

Q How did you arrange that?

A I sent these checks to this bank, under the name of J. D. King.

MR. McLAREN: You mean this particular check, you didn't send all of them?

A This particular check.

Q J. D. King, who was he?

A A fictitious name, the same as the rest. I sent these checks to the Columbia Valley Bank in the name of J. D. King.

Q By mail?

A Yes sir.

Q From where?

A From the points, I don't remember now.

Q Did the bank send these checks—

A I opened up an account with the bank and sent these checks for collection.

Q You opened up an account in the first place?

A On this particular check as J. D. King.

Q Did you go there to open it?

A No sir, by mail. I sent these checks by mail in the first place.

Q You opened an account by mail?

A Yes sir.

Q Then you checked it out in the same name?

A Yes sir.

Q You forged the name of King to these checks?

A Yes sir.

Q How did you get the money—How did they send it to you?

A Then this was checked out in my favor by this man J. D. King, this fititious King.

Q You cashed the checks in that way and sent to you by mail?

A Yes sir.

Q Were you ever in the Seattle National Bank?

A Yes sir.

Q Do you remember of any checks paid by them?

A Yes sir.

Q How did you manage that?

A Under the name of F. M. Clark

Q Did you open an account under that name?

A Yes sir.

Q You went in personally?

A Yes sir.

Q You would go in there and deposit them yourself?

A Yes sir.

Q From time to time?

A Yes sir.

Q And then check them out?

A Yes sir.

Q How about the Mutual National Bank, how did you manage that?

MR. McCORD: Montana National Bank it means, I suppose.

MR. McLAREN: Yes.

A That was done by mail, under another name.

Q Where from?

A From some part of Montana, wherever I happened to be. I was at different points in Montana.

Q Would you send more than one check at a time?

A Yes sir. I would generally send the bunch for the month.

Q And have them placed to your account?

A Yes sir, to the account of these fictitious names.

Q King?

A Yes sir, or Clark.

Q Did you have more than one fictitious name?

A Yes sir, the first was J. D. King.

Q How many accounts did you have with the various banks—You had one under the name of J. D. King and one Clark, and what else?

A That is all.

Q And this was done under these two names?

A Yes sir, as I remember.

Q Then you would forge the name of King on the check and make it payable to your order?

A Yes sir.

Q You didn't go and draw the money yourself?

A No sir. It was sent by draft to me at Seattle, and I would check it out from wherever I would happen to be.

Q When did you open the account with the National Bank of Commerce, or did you open it?

A The National Bank of Commerce, I opened an account there when they adopted this disbursing agent system.

Q Did you have the opening of the account yourself, or was it done from Washington?

A The deposit was made there from Washington, and I was notified of the fact.

Q The deposit was made from Washington?

A To my credit.

Q As M. P. McCoy, Special Disbursing Agent?

A Yes sir.

Q This was how the account was opened up?

A Yes sir.

Q You were directed to go there and leave your signature?

A Yes sir.

Q You went there and left your signature?

A Yes sir.

Q And you drew your money out of that account for various purposes connected with the Government?

A Yes sir.

Q Some that were legitimate, and some that were not, that is right, is it not?

A I checked that money out through other banks.

Q What—

A That is on checks cashed in other banks.

Q You drew checks?

A Yes sir and cashed the checks.

Q Every one of these checks contains your genuine signature?

A Yes sir.

Q And all of these in this bunch, to the best of your knowledge, are fictitious?

A Yes sir.

Q Is there anything on the face of these checks to advise or indicate the fact that there was anything fraudulent about them, was there?

MR. McLAREN: Which bank, the National Bank of Commerce?

A No sir, they are regular in every way.

Q The contents and endorsements are what the law required to be put upon them?

MR. McLAREN: I object to that as calling for a conclusion of the witness.

THE COURT: I sustain the objection.

Q That is on all of them?

A Yes sir.

Q Did you put the—I notice some of them have a voucher, number one voucher from the 6th to the 16th you showed these vouchers to the bank, did you?

A No sir, these vouchers were sent with my quarterly report to the land office at Washington.

Q You put in these all of the pay-rolls and sustenance and so on—I notice that some of them, or at least I thought some of them had no—did not have vouchers on them?

A The last ones, several of them are there not?

Q Some of these in April—In August 1909, examine these for August, 1909, did you put notations”—

MR. McCORD: I withdraw that question.

Q Did you exhibit your pay-rolls to the bank?

MR. McCORD: It is on the next page.

A No sir.

Q I see these checks, one bunch of them seems to have been paid direct, or part of these checks, take for instance the one for one hundred dollars, to J. D. King, the check is dated August 31, 1909, for one hundred dollars, number 13, and August 31, 1909, for sixty-two dollars, in fact all of these for August, with the exception of one or two seem to have been drawn direct without the intervention of any other bank, were they not?

A No sir, these were paid through the Seattle National Bank and are stamped indistinctly on the back of them there.

Q They were paid through the Seattle National Bank?

A Yes sir.

Q Now you referred to your instructions a while ago, from the Government, they authorized you, when this deposit was put there to sign checks for this money in drawing it out, did it not?

MR. McLAREN: I object to that question as calling for a conclusion of the witness and not the best evidence as to whether the letter of instructions authorized him to sign these checks.

(Discussion.)

THE COURT: I will overrule the objection.

A Yes sir.

Q You had authority from them to draw checks?

A Yes sir.

Q You showed that authority to the bank, I presume, you must have, did you not?

A Yes sir, I showed my letter of instructions to Mr. Maxwell, who was at that time cashier of the bank.

Q And these instructions that you got, you just exhibited them to him did you not?

A Yes sir.

Q You didn't give him any other instructions?

A No sir.

Q Just let him read your instructions?

A Yes sir.

Q The bank had no other instructions, except from reading your letter?

A I don't know, but I presume—

Q I don't want any of your presumptions—You don't know?

A I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A No sir.

Q There were no conditions, it had been remitted direct to

the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A Yes sir, the purport of them.

Q That is the substance?

A I don't remember the wording exactly, but that is the substance or object of the letter.

Q To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

MR. McLAREN: I object to that as calling for a conclusion of the witness as to the authority contained in the letter.

THE COURT: I overrule the objection.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

A Yes sir.

Q Now the bank, every month, rendered you a statement of your account, did it not?

A Yes sir.

Q And the vouchers, or the checks that you had used were not returned to you?

A No sir.

Q A list of them was returned to you in a statement of account?

A Yes sir.

Q Also the vouchers themselves and a statement were sent to the Department at Washington by the bank—That is the checks were sent to Washington?

A I don't know.

Q You don't know what the custom was?

A I presume they were but I had no means of knowing.

Q Your account was balanced up every month?

A Every quarter, yes sir.

Q Every month?

A No sir.

Q Was it every quarter?

A Every quarter.

Q The cancelled checks were sent to Washington—You understand that it is customary to send them to Washington?

A Yes sir, I do now.

Q These checks, so far as you know, were all sent to Washington at least every three months?

A Yes sir, I presume they were.

Q So that your account was balanced up every month between you and the bank?

A Yes sir.

Q The bank rendered you a statement every month?

A Yes sir.

Q They didn't wait until the end of the quarter, but rendered it every month to you?

A Yes sir.

Q They didn't render any to the Department at Washington?

A I don't know, I am sure.

Q Did the Government, prior to September, 1909, ever make any complaint or criticism of your acts or your dealings with the Government in regard to these examinations of surveys?

A No sir.

Q They never offered any criticism at all of any kind?

A Oh, once in a while there would be some item suspended for explanation, as for instance a telegram, a copy of which would have to be sent. Where I had failed to send a copy, or something like that, or some clerical error.

Q As I understand it, you sent in until October, 1908, you sent in to the Department at Washington vouchers for everything that you expended?

A Yes sir.

Q Purporting to be signed by the men who had done the work or furnished the supplies?

A Yes sir.

Q That is true, is it not?

A Yes sir.

Q These were sent in monthly, were they not?

A Prior to the adoption of the Special Disbursing Agent, yes sir.

Q After the adoption of the Special Disbursing Agent scheme, they were sent how often?

A Quarterly.

Q When was the disbursing agency feature adopted?

A I think after the first of October, 1908. That is when we began.

Q After the account was opened up in the bank in your name as Special Disbursing Agent and as examiner of Surveys, from that time you sent in your vouchers quarterly?

A Yes sir.

Q And continued to do that until October, 1908, did you?

A I continued to do that until my arrest in 1909, September, 1909.

Q You sent in the vouchers, as well as the payrolls?

A No sir, sent in the payrolls after we adopted that plan.

Q October, 1908?

A Yes sir, prior to that time sent in vouchers.

Q You continued to send in payrolls quarterly after October, 1908.

A Yes sir.

Q So that throughout the whole history of these transactions, from the time you opened the account in the Bank of Commerce, until you were arrested, you sent in, every three months, vouchers for every dollar you claim to have expended?

A Yes sir.

Q These vouchers were used until October, 1908?

A Yes sir.

Q After October, 1908, the labor and services went in under the payroll?

A Yes sir.

Q You continued to have each member of the payroll sign that voucher?

A Yes sir.

Q They signed the payroll, each member that you claimed pay for services?

A They signed the payroll, yes sir.

Q Other services were on independent vouchers?

A Yes sir.

Q That was up to the time of your arrest?

A Yes sir.

Q The Government, at all times then, from 1907 up until the time of your arrest on September 1st, 1909, had these vouchers in its possession?

A Yes sir.

Q Now the Government could, very easily, by sending men out to check up the ground work and field work have ascertained that you had never been over it, could they not?

A Yes sir.

Q And that is the way that they finally stumbled onto the illegal practice?

A Yes sir.

Q Or it was an easy matter, was it not, to have found out from the people in the vicinity that you had not done this work, was it not, Mr. McCoy?

A Except in the sparsely settled districts.

Q If they had made any investigation at all, or if they had enquired for any of these men you claim to have paid money to, they could have ascertained that the men could not have been produced?

A Yes sir.

Q So that by the simplest sort of an investigation they could have found out that there were no such people in existence as those whose names you had given?

A Yes sir.

Q Did they ever inquire from you, as to the men who composed these accounts, as to their residence or postoffice address of any of these individuals to whom you claim to have paid money?

A I think each voucher shows the postoffice address of each man who signed the voucher.

Q And all of these were fictitious and there was no such person at that place?

A No sir.

Q And a letter addressed to them would have been returned uncalled for?

A Yes sir.

Q I don't want to embarrass you, Mr. McCoy, but I want to ask you the question because I think it is necessary—When were you arrested and where?

A It was about the first of September, 1909.

Q Where were you arrested?

A At the Lincoln Hotel at Seattle.

Q With what offense were you charged?

A The offense of embezzlement of Government funds.

Q Of what particular embezzlement were you charged with?

A I don't remember.

MR. McLAREN: I will stipulate that he was indicted, arrested and sentenced for embezzlement covered by the checks shown in Exhibit "A."

MR. McCORD: You said you would produce the indictment.

MR. McLAREN: Do you want the indictment now?

MR. McCORD: No, you can put it in. The indictment will be introduced showing the charge against him.

A Do you know what particular checks made up those you were arrested for embezzling on? What the particular funds were?

A I don't remember. I was rather embarrassed at the time the indictment was read to me, and I don't remember.

Q You were sentenced in Seattle?

A In Tacoma.

Q Were you tried?

A No.

Q You pleaded guilty to the indictment and you say that you don't know what was in it?

A No sir, I don't remember now.

Q You are now out on parole?

A No sir, I am at liberty, my parole expired on the 19th of last month.

Q So you are completely freed?

A Yes sir.

Q You are not pardoned?

A No sir.

Q So that your civil rights have not been restored?

A No sir.

Q Did you not make any application in person?

A No sir. I made an application for a parole and it was granted.

Q Mr. McCoy I will have to go into those a little more in detail, as I don't know how all of these different names here, that is the names of H. M. Benson, A. C. Jenkins, Charles Paine, George K. Cooper, E. M. Bassett, Joe Mikel, A. J. Whitney, F. W. McCulley, George D. Cook, F. M. Clark and J. D. King,"—

MR. McLAREN: Those are the names referred to in the checks.—“all covering the month of August, 1909, I want you to tell me, if you can, how you can go through those and tell now, after the elapsing of five years, which ones of these signatures are fraudulent, and which are not, or that all of them are—I ask you whether you can do that from any independent examination of the signatures, as they now appear, or can you tell only because you were not doing any work during this period of time?

A I could not identify these from these fictitious signatures, but I can identify them from my own signature having issued the checks.

Q Well your signature does not appear on any of those checks—that is the signature of M. P. McCoy, except as the drawer of the check?

A That is all.

Q Can you independently say that all of these names placed on these checks and made by you, can you tell now from an examination of those signatures at this time—I don't see how it is possible—Tell me whether if you didn't have these passed up to you, and without any other information, whether you could tell whether these were forgeries?

A No sir, it would be impossible for me to tell.

Q If you saw the checks you could not tell that they were forgeries, except, as you say, between 1907 and 1909, you say that you did not issue any legitimate checks?

A Yes sir.

Q That is the only way you can tell?

A Yes sir.

Q That is also true of the vouchers, is it not, you could not tell that these were forgeries on the vouchers from an inspection of the vouchers at this time?

A Yes sir.

Q How?

A Simply by knowing that they were fraudulent.

Q I say by an examination of the voucher itself, independent of your personal knowledge, you could not tell, it would be an impossibility?

A No sir.

Q Now, Mr. McCoy are you not mistaken in saying that, from 1907, the date of the first of these checks, October 14, 1907, to September 30, 1909, two years that you did not issue a single genuine check?

A Not as against the National Bank of Commerce.

Q How do you know that? You transacted business and had men in your employ, and were paying them from some source or other, now is it not possible that some of these checks that you drew were payable for a legitimate purpose and to the men who earned the money?

A No sir.

Q Why do you say that?

A Because whenever I incurred expenses in the field I paid it to the individuals themselves, and in order to carry this thing through I would issue checks against the National Bank of Commerce but only those that were fictitious.

Q What work were you doing from October, 1907, to September 30, 1909, what particular surveys were you examining?

A Surveys in the states of Washington, Idaho, and Montana. The records would show the title of each survey that is to whom contracts were let, but who they were now, I cannot recollect.

Q You are sure that you never drew any checks in their favor on the National Bank of Commerce?

A I am sure of that.

Q But you used the money that you got from the National Bank of Commerce in paying them?

A Yes sir, except those payable to myself.

Q The money that you got on these fraudulent checks you used, in part, to pay these men?

A Yes sir.

Q How much you have no means of knowing?

A No sir.

Q Otherwise that it is from one to four thousand dollars?

A Yes sir, somewhere within those sums.

Q But you did render seervices to the Government, valuable services, during that period, did you not in examining these surveys?

A Yes sir.

Q And employed men to assist you in getting the information you did furnish the Government?

A Yes sir.

Q And you did have men employed by you in examining surveys for the Government?

A Yes sir.

Q I would like to—If you can give me some more correct information as to the amount of money you spent on each particular survey, the number of men you would employ and

I would like to have you try to recall, Mr. McCoy, about how much money you spent legitimately from 1907 to 1909, that you paid for out of funds that you carried in this bank?

MR. McLAREN: Q Is it your testimony, Mr. McCoy, that the actual services which you did pay for during this period, were paid out of these fraudulent checks, or did you put in a personal check to pay for these services?

A I got this money individually.

Q Out of the proceeds of your personal checks?

A I paid them with my own money.

Q I want to get this clear—During the time that these fraudulent checks were sent in by you, you also sent in checks payable to yourself for different amounts, did you not?

A Yes sir.

Q Was it out of these checks, payable to yourself, that you paid the men that you had employed, or did you pay these men out of the proceeds of these fraudulent checks?

A I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and over time and part of the money I got from the fraudulent checks.

Q You kept all of this money in the bank?

A Yes sir.

Q The National Bank of Commerce?

A Yes sir.

Q When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A Yes sir.

Q Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A Yes sir.

Q You could not tell which?

A No sir.

Q You have no doubt but that you paid out from one to four thousand dollars for the Government in this way?

A Yes sir.

Q Most of it came from the fraudulent checks, because there were more of them?

A Yes sir.

Q So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A Well, the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q It was all mixed together?

A Yes sir.

Q The money which you did use to pay these legitimate expenses and labor was money paid out of your own personal bank account into which you had put the money realized from these fraudulent checks?

A Yes sir.

Q That is right, is it not?

A Yes sir.

Q Now take, for instance, the surveys for the year 1907, can you tell where you examined one—just recollect one where you did any work on it?

A Without having the records before me, I could not tell that.

Q It is possible, is it not, that you have paid out more than four thousand dollars?

A No sir, I should not estimate it any higher than that.

Q You think that four thousand is the maximum?

A Yes sir.

Q Would you consider that approximately the sum?

A I should say a couple of thousand. It might have been more or it might have been less.

Q It might have been as much as four thousand?

A It might have been over two thousand.

Q The last one of these vouchers was sent on September 30, 1907?

A No sir the last one went in—

Q June 30, 1909?

A Yes sir, June 30, 1909.

Q You didn't send in any after that?

A No sir.

Q But you drew quite a number of checks after that did you not?

A Yes sir, I drew checks at the end of July and to the end of August.

Q Did you keep any account in any other bank than the National Bank of Commerce as Special Disbursing Agent?

A No sir.

Q Did the Government not receipt to you for these various accounts that you sent in?

A No sir, it was not their practice, but they did, however, at the end of the year send me a statement from the auditor of the interior department of my account and including the account for the past year.

Q They verified your account at the end of 1907, did they?

A Yes sir.

Q And verified it at the end of 1908?

A Yes sir.

Q Tell you it was correct?

A Yes sir, letters were sent me from the Auditor of the Interior—from the Auditor of the Treasurer of the Interior Department and sent me these statements, at the end of these periods, stating that my account had been examined and found correct, or that there were some slight discrepancies and that they needed correction, or something of that kind.

Q What officer of the National Bank of Commerce, did you do your business with, Mr. Maxwell?

A It was the young man who had charge of the disbursing of the Government funds in the rear of the office, I don't remember his name, in fact I never knew his name. He was one of the bank tellers.

Q Ever do business with Mr. Backus?

A No sir.

Q Did you ever do business with Mr. Stacey?

A No sir.

Q Did you ever do any business with Mr. Seewell?

A No sir.

Q Mr. Maxwell, you did show him your credentials?

A Yes sir.

Q Did you turn your signature over as Special Disbursing Agent?

A Yes sir.

Q And your written instructions were to show your orders to the bank, were they?

A I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q You were authorized to draw it out on your signature?

MR. McLAREN: I object to that, Your Honor, as calling for a legal conclusion of the witness.

(Discussion.)

THE COURT: I overrule the objection.

MR. McLAREN: Exception.

A Yes sir.

Q You showed that to the bank?

A Yes sir.

Q You didn't tell them anything about your being unlimited in your power to draw that money?

A No sir, I simply showed them my letter.

Q The letter didn't contain any limitations on your powers?

A No sir.

Q It was an unconditional authority?

A Yes sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q With that exception there was no limitation?

A No sir.

Q There was no limitation on the authority of the bank to pay you money?

MR. McLAREN: Same objection, Your Honor.

THE COURT: Objection overruled.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

A No sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q It didn't say anything about it at all?

A Well I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q You don't think that anything was stated as to any limitation at all?

A I don't think that there was any limitation stated.

Q When you say that you don't think that you could draw checks in favor of your own order, you are getting that from information other than that contained in the letter?

A Yes sir.

Q There was nothing in the contents of that letter that indicated that you could not draw it in your own favor?

A No sir, not that I can remember.

RE-DIRECT EXAMINATION

BY MR. McLAREN:

Q When were you paroled out, Mr. McCoy?

A March 15th, last.

Q March 15, 1911?

A Yes sir.

Q You have been steadily employed in the City of Spokane for how long?

A Since June 15th.

Q For what firm?

A W. A. Richards, architects.

MR. McCORD: That ought to be Ritchie.

MR. McLAREN: Ritchie, yes.

Q Since when?

A June 15, 1911.

Q You have never had any difficulty or trouble with the Government before this transaction of the fraudulent checks during all the time you worked?

A I never had any trouble with any body, the Government, or any body else.

Q Under your authority from the Government you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?

MR. McCORD: I object as incompetent, irrelevant and immaterial, and asking for an interpretation of a question of law by the witness.

MR. McLAREN: I think that is proper, Your Honor, in view of the questions asked upon Cross Examination.

MR. McCORD: (Reading) "Under your authority from the Government, you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?" Now, that is the very question here, Your Honor. I object to it as incompetent, irrelevant and immaterial and asking for a conclusion and asking for the interpretation of the contract, what his authority was.

THE COURT: I sustain the objection.

MR. McLAREN: An exception.

THE COURT: Exception allowed.

MR. McCORD: (Reading) "When you told Mr. McCord that your letter of instructions"—

MR. McLAREN: That goes with the same ruling. Turn over to the next page.

MR. McCORD: The next page.

MR. McLAREN: Begin next at the second question on page 50.

MR. McCORD: The second question?

MR. McLAREN: Yes.

Q During the time covered by these checks, you were not doing much of any work—Were you doing anything in April, 1908, do you recollect being over at Great Falls, Montana?

A I don't remember anything specially.

Q I hand you four vouchers, numbered fifteen, sixteen, seventeen and eighteen, commencing April, 1908, to J. D. King, A. M. Anderson, F. M. Clark and Fred Evans, state whether these were fraudulent?

A Yes sir.

Q You received the money on these vouchers?

A Yes sir.

MR. McCORD: I make the same objection to that, if Your Honor please. I object to it as irrelevant, incompetent and immaterial.

MR. McLAREN: I offer in evidence now these vouchers, Plaintiff's Exhibit "E," being Nos. 15, 16, 17 and 18, upon this theory: it developed on cross examination by Mr. McCord that there was a possibility, at least a theory that part of the proceeds of these fraudulent checks might have inured to the benefit of the government in payment, as the witness testified, in cash to the men whom he had employed during the period covered by the checks. I now offer to show by these exhibits that in addition to monies received by him from the fraudulent checks, he handed in vouchers which I now offer in evidence, covering a portion of the same fictitious persons, Anderson, Clark, King and the rest of them. My position is clear. Counsel contends and will contend I presume from the line of cross examination developed that even although the money was all obtained irregularly and fraudulently from the bank, yet if as a matter of fact he applied a part of that money to the payment of actual bills, that they are entitled to show that, as the government would not be damaged by that appropriation of that money. Now, I am offering to prove by these exhibits that there were other monies which were used in payment of these actual expenses.

THE COURT: As at present advised, I will rule against you, Mr. McLaren. If I should change my mind about it, I will let you introduce these. I don't think they are material in this case at all.

MR. McLAREN: The Court will allow us an exception.

THE COURT: Exception allowed.

Q I hand you voucher for November, to yourself, for two hundred and seventy dollars—Can you state whether or not you worked during that month of November, 1907?

MR. McCORD: I object to that as immaterial. They are offering that for the same reason I suppose, Your Honor. He drew his own check, drawing two hundred and seventy dollars a month.

THE COURT: I will sustain the objection.

(Discussion.)

THE COURT: I will sustain the objection.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

MR. McLAREN: Now, the same objection and the same ruling to the other voucher for December, I presume.

MR. McCORD: How far down is the next one, Mr. McLaren?

MR. McLAREN: I offer in evidence Plaintiff's Exhibit "F," being vouchers for the months of November and December, 1907, in favor of the witness.

MR. McCORD: Same objection.

THE COURT: Sustained.

MR. McLAREN: An exception.

THE COURT: Exception allowed.

MR. McCORD: Where do you want me to read now?

MR. McLAREN: I think the next question is open to question yet.

MR. McCORD: All right. Which one is the next one?

MR. McLAREN: "Now I hand you a certificate, signed by yourself"—on page 51, about the middle of the page.

MR. McCORD: Yes.

Q Now I hand you a certificate, signed by yourself, for the month of April, 1908, and I will ask you, if, on the first page of this, that is your signature "M. P. McCoy, Examiner of Surveys"?

A Yes sir.

Q Calling your attention to the item of disbursements, as shown by that itemized statement, and calling your further attention to page two, to a certain entry of expenditures, under date of April 8th. "To J. J. Carlton, Darby, Montana, for hire two horses and buggy, with driver, expenses, etc., eighteen dollars," is that part of a voucher that you returned under that heading?

A It is.

Q Calling your attention to the second portion, marked page three, under date of April 30th, 1908, "To J. D. King, Great Falls, Montana, for services as chairman, from April 19 to 30 inclusive, twelve days, twenty-four dollars." Is that the same J. D. King the fictitious person?

A Yes sir.

Q To F. M. Clark, Great Falls, Montana, services as chairman, twelve days, two dollars, twenty-four dollars, is that the same fictitious person?

A Yes sir.

Q Fred Evans, Conrad, Montana, for board and lodging assistants, J. D. King and F. M. Clark, John Howard, E. M. Roper and A. M. Anderson, forty-five dollars and six cents, those are the same fictitious persons?

A Yes sir.

Q Calling your attention to page two of this itemized statement, April 21st, "To J. L. Murray, Helena, Montana, for board and lodging assistants J. D. King and F. M. Clark April 21, four dollars." Those are fictitious persons are they?

A Yes sir.

Q Ray Jones, Great Falls, Montana, for board and lodging assistants, J. D. King and F. M. Clark, April 22nd, three dollars, that is fictitious, is it not?

A Yes sir.

MR. McLAREN: I offer in evidence now Plaintiff's Exhibit "C," being the certificate of Mr. McCoy during the month

of April, 1908, consisting of two separate parts, the substance of which has been referred to in the previous questions.

MR. McCORD: I have no objection to those two.

THE COURT: They may go in.

Certificate referred to admitted in evidence and marked Plaintiff's Exhibit "G."

Q You testified a while ago that during this period covered by the fraudulent checks, you were doing some work, is that true?

A Yes sir.

Q That is on different surveys?

A Yes sir.

Q You also testified that you had paid these men money, did you employ the cash which you received on your own checks?

A Yes sir, I paid them in cash.

Q You testified further that you thought that the cash might have been from the proceeds of these fraudulent checks?

A Possibly, I mean, that is all.

Q Is it not true, as shown by the statement in Exhibit "G," which I have just shown you, that you had also received other money which you were not entitled to and which you didn't earn which is not covered by these checks?

A Yes sir.

Q When you say that possibly some real services may have been paid out of these fraudulent checks, you don't know whether it is true or not?

A Yes sir, I know it was true.

Q How much was there of it?

A Well I am unable to tell how much.

Q How can you tell that it was not paid out of these fraudulent checks?

A I cannot tell that it was out of these fraudulent checks, but it was out of my money.

Q You cannot tell that it was not paid out of these fraudulent checks?

A No sir, I paid it out of money that I obtained whether it was from my salary, per diem or from these I cannot say.

Q Do you recall, Mr. McCoy, how the expenses covered by these vouchers, for April, 1908, were paid to these fictitious persons named in there—To refresh your recollection, I will call your attention to the month of April, 1908, as to the fraudulent checks in this case do you recollect how they were paid?

A That was done prior to my appointment as Special Disbursing Agent.

Q In 1908, this is in April and the appointment was—

A I don't understand why this—During part of this year I was addressed as special agent of the General Land Office, and I acted as special agent under instructions from the commissioner of the General Land Office, and during that time I was examining applications for surveys for different people around there over the different states in which I traveled and during that time I was acting as special agent and not as disbursing agent, and this month covers both, where I was acting as special agent and also as examiner of surveys.

Q How about May, 1908?

A Yes sir.

Q How about March, 1908?

A Yes sir, the same way.

Q I will call your attention to the itemized report for March, 1908, that is your signature M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Disbursements as shown by within itemized statement and vouchers, one hundred and seventy-five dollars and twenty cents, that is the amount of the items set forth on the inside pages, is it not?

A Yes sir.

MR. McCORD: I object to that, Your Honor, as irrelevant, incompetent and immaterial and not the best evidence. The document itself Your Honor ruled out.

MR. McLAREN: I beg pardon.

MR. McCORD: It is the contents of an instrument that the court has already ruled would not be admitted.

THE COURT: I sustain the objection.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

Q Is it not true, Mr. McCoy, that all of the actual services which you did incur, during the period covered by the fraudulent checks, were as a matter of fact itemized in your various reports, sent in and paid by the Government's money, either to you or to the persons whom you had hired by checks outside of these fraudulent checks which you have before you?

A Yes sir.

Q Then it could not be possible, if this is correct, that you paid for any of the actual services rendered out of the fraudulent checks, that would not be possible?

A It is possible in this way, that I had money obtained by fraud and also money obtained legitimately—

Q Is it not also true that all the money that you obtained legitimately would be paid through vouchers and checks other than these fraudulent ones?

A No sir.

Q Then why did you send in such a voucher as is shown on March, 1908, and also in April, 1908?

A That is when I was acting as special agent for the General Land Office.

Q Not disbursing any?

A I was not disbursing anything, but I was paying my railroad expenses and hotel bills.

Q During these two months is it not true that you put in accounts for King and Clark—

A That was during the latter part of the month, April when I was acting as examiner of surveys.

Q I believe that you testified that you signed all of these vouchers and reports shown in Exhibit B, as M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Mr. McCoy in reference to your field notes, which you say were faked, during the time that you were not actually doing the work, as I understand your testimony in answer to Mr. McCord, you modified the field notes of the Surveyor General so as to give them the appearance of being genuine?

A Yes sir.

RE-CROSS EXAMINATION

By Mr. McCORD:

Q You say that these vouchers which you refer to, Exhibit "G," covering the months of March and April, 1908, that then you were acting as special agent for the land department?

A During part of the time.

Q And in that case you rendered an account of the work you did and received the money for it, did you?

A That is the way I remember it.

Q Well now then, how long did you act as special agent of the department approximately?

A Well during each spring, for a month or two.

Q So that in 1908 and 1909 you were also acting as special agent?

A Yes sir. No excuse me, in 1909 I am under the impression that I did not act as special agent.

Q During this whole time you draw two hundred and seventy dollars a month, you were busy with government work all the time yourself?

A Yes sir.

Q Do you consider that you earned the two hundred and seventy dollars a month, yourself?

A No sir. I didn't when I was acting as special agent.

Q Part of the time you say you were—you had men employed doing legitimate work making surveys during the time that you were entitled to your salary?

A Yes sir.

Q On most of them covering this early period, you yourself

were engaged, were you not in tending to the work you were having done, you said that you had quite a considerable work done in examining surveys and running lines and you were employed by the Government and you were receiving money from the Government at that time, were you not?

A Yes sir.

Q So that during most of your time you would consider that you were fairly entitled to the money that you drew, two hundred and seventy dollars per month?

A No sir, not during the last two years, I didn't consider that I did.

Q They paid you your salary?

A Yes sir.

Q They never objected to paying it at any time, they never raised any question about paying you?

A Yes sir, small ones.

Q They never sued you to recover it back?

A Not that I am aware of.

Q How long a time, Mr. McCoy, did you spend in the penitentiary at McNiel's Island?

A A year and a half.

Q How long were you sentenced for?

A Three years.

Q You were paroled after about a year and a half?

A Yes sir.

RE-DIRECT EXAMINATION

By MR. McLAREN:

Q You have just testified, Mr. McCoy, that you received your salary during all of that period and that the Government didn't protest the payment of your salary—I presume that you refer to your monthly vouchers which are shown in Plaintiff's Exhibit "B"?

A Yes sir.

Q And which you have certified as being correct?

A Yes sir.

Q On these vouchers is the alleged residence of the fictitious persons in each case, the place where they were supposed to have been living at that time?

A Yes sir.

Q You didn't do any work during the summer of 1909?

A No sir.

Q Did you ever do any work—

A Except early in the spring.

Q Can you tell approximately how many months pay you had rendered services for during the period covered by the vouchers you sent in—I don't mean exactly but somewhere nearly?

A No sir, I could not tell you that.

Q Can you tell by consulting the names and addresses, Mr. McCoy?

A No sir, the only way I could tell it would be by having a list of the surveys, but I could not tell it from any information that I have here.

Q Could you tell from the Great Falls, Montana—

A I was there mostly as special agent.

Q During the period covered by these checks, however?

A Yes sir.

Q There were no checks between January, 1908, and May, 1908, during the spring while you were examining these surveys and not disbursing any?

A No sir.

MR. McLAREN: In view of the cross-examination developed by Mr. McCord, I now renew my offer in evidence of Exhibit "B," being the vouchers that were sent in by the witness and concerning which Mr. McCord examined the witness freely upon cross-examination.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial.

THE COURT: I sustain the objection.

W. G. GOOD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. McLAREN:

Q Will you state your name to the Clerk, Mr. Good?

A W. G. Good.

Q W. G. Good; G-o-o-d?

A Yes sir.

Q What is your position with the government service, Mr. Good?

A Special agent of the General Land Office.

Q How long have you held that position?

A A little over seven years.

Q How long have you been in the government service all told, Mr. Good?

A Seven years.

Q Approximately?

A Seven years the first of February.

Q Were you in that position in the summer and fall of 1909?

A I was.

Q Are you familiar with the method and custom of the department at that time as to checking up the surveys of public lands that had been made by contract? If you are not, say so, and I will—

A Wouldn't say that I am familiar with checking up surveys.

Q No, I mean the method.

A Yes sir, in a way, yes sir.

Q Will you explain to the jury, Mr. Good, how the government has its public lands surveyed in the State of Washington and adjoining states and then how those surveys are checked up, if in any way.

MR. McCORD: Are you a surveyor? Have you ever been in the land department as a surveyor?

THE WITNESS: No sir, I am not a surveyor.

MR. McCORD: I don't think the witness is qualified to testify.

MR. McLAREN: I will qualify him.

Q Are you familiar, Mr. Good, with the method and practice of the department in making its surveys and checking them up?

A Well, I am familiar with the method of letting contracts and the way they are checked up by the examiner of surveys, and so forth.

Q That is what I mean.

A Yes sir, I know how that procedure is gone through with.

Q Now, will you explain that procedure to the jury?

MR. McCORD: I object. The witness has not shown himself to have qualifications at all.

THE COURT: I will overrule the objection.

MR. McCORD: I object as incompetent, irrelevant and immaterial.

Q Proceed Mr. Good.

THE COURT: Well, I don't know how material it is in this case to go into that.

MR. McLAREN: I will withdraw that question for the present, then, if the Court please.

Q Now, refreshing your recollection, Mr. Good, do you recollect anything about the transactions of one M. P. McCoy during the summer of 1909 while he was acting as special disbursing agent.

A I do, yes sir.

Q State whether or not you made any investigation of charges of irregularities against him in his work with the government?

A I did.

Q What were those investigations, Mr. Good?

A Why, I investigated his—I tried to investigate his work on the Colville Reservation here in 1909, the summer of 1909; also some work that he did in Montana in 1908 on different surveys that he was supposed to be checking up.

Q To refresh your memory, Mr. Good, I will ask you to examine some of these checks which are marked Plaintiff's Ex-

hibit "A" and state whether or not you made any investigations to determine whether the payees in those checks or the names as shown as payees in those checks were fictitious or otherwise?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

MR. McLAREN: I expect to prove by this witness that these persons were fictitious persons, the names were fictitious.

THE COURT: The objection is overruled.

Q Did you make such investigation, Mr. Good?

A I did as to the supposed employees working for Mr. McCoy during the year 1909 and 1908.

Q Was that investigation made at the places where these parties' residences were supposed to be?

MR. McCORD: I object to that as leading, irrelevant, incompetent and immaterial.

MR. McLAREN: I will change the form of question, Mr. McCord. It doesn't make any difference.

MR. McCORD: I don't care about the leading part of it. I object to it as incompetent, irrelevant and immaterial.

Q Did you find any such person as J. D. King?

A I did not.

MR. McCORD: Ask him where he examined or something of that kind. Such a question without stating where is too indefinite.

THE COURT: Well, he can't tell it all at once. He has got to have a beginning somewhere. I overrule the objection.

MR. McCORD: Exception.

THE WITNESS: In the first place I called for the—on the Commissioner of the General Land Office for Mr. McCoy's monthly and quarterly statements of his accounts to ascertain the name—

MR. McCORD: What is that?

THE WITNESS: To ascertain the names of the people that he was supposed to have working for him.

MR. McCORD: I move to strike out that, Your Honor,

as not the best evidence. He gathered certain information from certain public records in Washington.

MR. McLAREN: That is simply preliminary and leading up to the investigation.

THE COURT: Objection overruled. Motion to strike out denied.

MR. McCORD: Exception.

Q Proceed, Mr. Good.

A And those statements, those quarterly statements, also vouchers, set out the different men that he was supposed to have had working for him.

MR. McCORD: I move to strike out, Your Honor, from the witness' testimony the statement as to what certain public records in Washington showed as not the best evidence.

MR. McLAREN: I have offered those same vouchers and counsel objected to them. I don't think it lies now in him to object as secondary evidence.

MR. McCORD: It is not secondary evidence.

THE COURT: The motion to strike out is denied. The objection is overruled.

MR. McCORD: The Court will allow me an exception.

THE COURT: Exception allowed.

Q Proceed, Mr. Good.

A And to secure the addresses of the different employees and in that way I had some grounds to work on to look up these people. This man King was supposed to be from Great Falls.

MR. McCORD: I move to strike out that, Your Honor, where he was supposed to be from, as wholly immaterial, irrelevant and incompetent.

THE COURT: You need not repeat that every time. I will let you have a bill of exceptions and have it all in. I am going to let him testify about his whole investigation.

MR. McCORD: Understand I have an exception to all. I don't desire to impede the progress of the trial.

THE COURT: You may have your exception.

Q Go ahead, Mr. Good.

A Well, I found out the addresses of these different employees and the names of the employees as set out in Mr. McCoy's vouchers and checks and so forth, and I went to the different places where these different addresses were given to try to locate these different employees, different places in Montana, Great Falls, Benton, Culbertson, and Glasgow, I made a thorough search for these different employees and was unable to find any such men as set out in his accounts and his statement of expenditures and also as to the checks that were issued in payment for services and labor.

A JUROR: Will you speak a little louder.

MR. McLAREN: The juror didn't get the last part of your answer. Will you repeat the last portion of your answer, that you didn't find any of the persons named?

A Yes sir, as set out in checks and vouchers that he rendered a statement—he rendered a statement every month of his expenditures and he set out in all those monthly statements the employees that he had under him and for supplies and so forth that he purchased during that month, that is where I ascertained the names of the different employees and amount of supplies that he bought from different concerns, got the full statement of the Commissioner of the General Land Office as to his expenditures for each and every month.

Q As a result of that investigation did you find all of those persons named as payees in the checks, Exhibit "A," were real or fictitious persons?

A I was unable to locate a single one.

Q You examined in each case, did you, the locality where they were supposed to have been employed?

A I did for the years 1908 and 1909.

Q About what length of time did your investigation consume, Mr. Good?

A About six weeks all told.

CROSS-EXAMINATION

By MR. McCORD:

Q Have you gone through all of these checks in Exhibit "A" recently?

A I have not, no sir.

Q You don't know whether those are the checks that you were investigating five or six years ago or not, do you?

A When I was here in September or August, 1909, I secured from the National Bank of Commerce quite a bunch of checks that they had on hand that they had not transmitted to the commissioner of the General Land Office, to the treasury department at that time, they were the only checks that I ever saw in connection with Mr. McCoy's account; the others had been sent to Washington.

Q Do you know what checks you ever saw; are those the checks; are you able to tell which ones you got from the National Bank of Commerce here in September, 1909?

A Well, I had all the checks that were cashed, and if I remember right, for July and August at that time.

Q July and August at that time?

A Yes sir, the bank turned them over to me and I had them in my possession for several days.

Q Now, all these checks that have been introduced here and what is known as Exhibit "A," covering this entire length of time, did you ever go over these checks and examine them?

A Not today, no sir.

Q What?

A Not today, no.

Q Well, when did you examine them?

A I have not examined any of these checks; I haven't seen them before until I just came in here except if any checks are included here that I saw while I was here in 1909.

Q As a matter of fact the only checks that you have ever seen in this McCoy transaction were the few checks in the months of July and August, 1909, that you got from the National Bank of Commerce?

A That is all, yes sir, at that time.

Q Now, as a matter of fact you only got the checks for the last month in 1909, did you not?

A I think it covered July and August, I think they made a quarterly return to the—

Q As a matter of fact don't you know that they make a return or did make a return monthly and did send in the checks monthly?

A They might have; however, since you brought the matter up they didn't make a return at that time for July and I got the checks for July and August, for two months at that time.

Q You never examined any other checks except those?

A No, I wasn't in a position to; they were in Washington.

Q And you never examined them in Washington either, did you?

A No sir.

Q You never saw them?

A No sir.

Q And whether or not the checks referred to, the fictitious people referred to in these checks were the ones that you examined over in Montana or not you don't know?

A No.

Q Except that they are similar names?

A I never saw the checks before.

Q You don't remember those names, King and all that bunch of twenty-five or thirty names, do you?

A Well, going through here I could recall these names, checking up my work that I went through a year and a half ago or two years ago.

Q Take the examination of the surveys in Montana where the men were supposed to be employed, the parties living, some of them at Glasgow you said?

A Yes sir.

Q What sort of an investigation did you make?

A Well, as I said I secured from the office in Washington his original—

Q I understand you got the names in Washington?

A Got his original vouchers and his—

Q Got the names and the purported addresses and you went out to investigate. What did you find?

A I had the original pay-rolls signed by these different parties and also the vouchers that I secured, were sent to me.

Q What I want to get at is what investigation did you make. Did you go to Great Falls and investigate there?

A Tried to locate these parties, yes sir.

Q What sort of an investigation did you make? How extensive? What did you do?

A Well, I went to Great Falls for instance.

Q Well, I want to know what you—

A Ascertained from the postmaster, directory, any way possible to locate a certain man that I was after that was supposed to live at Great Falls. For instance I went to the County Surveyor's office, took it for granted that these men were surveyors, to ascertain whether there was such a surveyor living in that part of the country.

Q You didn't find any of them?

A Couldn't locate a single man.

Q And as a matter of fact after you made that investigation as to one or two men you reached the conclusion that they were all forgeries, didn't you?

A I beg your pardon?

Q Did you run down each man in the same way?

A I did.

Q I will ask you if it was upon your investigation that the government reached the conclusion that this particular package of checks, aggregating \$15,000, were fraudulent?

A Why, I made a report on the case and also what I gathered from the man that wrote the checks, Mr. McCoy admitted they were all forgeries to me.

Q In other words, your report was based on what Mr. McCoy told you and your investigation in a cursory way?

A And what I heard in court in Tacoma when he was found guilty.

Q When you found Mr. McCoy was guilty of perpetrating frauds you didn't spend very much time in tracing it down, did you?

A It was not necessary.

Q That is what I say.

A He admitted everything.

Q You knew the man was guilty, he admitted he was guilty, he admitted that he had robbed the government and proved unfaithful to his trust and you were not busy in making any further investigations, were you?

A No after that.

Q And as a matter of fact the list of checks made up there now is based entirely upon the testimony of Mr. McCoy, isn't it, that is except for probably the months of July and August, 1909?

A Why, I am sure I don't know; I don't quite understand what you are trying to get at.

Q What I am trying to get at is this: I say in determining the fraudulent checks that had been issued the government acted upon your report you say and you acted on Mr. McCoy's statement, didn't you, for the most part?

A To a certain extent, yes; I couldn't ascertain who these men were and he admitted that there weren't such men and the checks were all fraudulent and—

Q And when he admitted that, you were ready to assume that it was all true, weren't you?

A Well, as far as the investigation that I made, I found out that to be a fact.

Q Well, you made the investigation before you had him arrested?

A I did, yes sir.

Q But you didn't make it covering his entire work for the

two or three years; you only had him indicted or had him charged with the embezzlement of a few sums, did you not?

A He was indicted here for depredations that took place here in Washington, yes.

Q I understand that, but it was only one particular item, wasn't it, or two?

MR. McLAREN: That is objected to as not calling for the best evidence.

Q I ask if you know.

A Covering his shortages here for the past year, that is what he was indicted for here.

Q You have not seen the indictment yourself, have you?

A I did see it.

Q You don't remember that?

A No.

Q You couldn't tell. That would not be the best evidence.

A That is a matter of record.

Q What I am getting at is this: when you went over into northern Montana, you were the fellow that got onto his scheme, weren't you, Mr. Good?

A Yes sir.

Q A couple of men up in northern Montana somewhere got into a row over a homestead and you went up there as special agent to investigate it, didn't you?

A No, I beg your pardon.

THE COURT: It is now time to adjourn. We will adjourn until tomorrow morning at ten o'clock. Gentlemen of the jury, until that time you will be permitted to separate. You are instructed that while you are out of court you must not talk about this case or any subject matter connected with it. You will not discuss it between yourselves or any one or listen to what anybody may say about the case out of court. You are also especially instructed to have no conversation on

any subject whatever either with the witnesses or attorneys or parties interested.

(Further proceedings continued until 10 o'clock A. M., March 13, 1912.)

March 13, 1912, 10 o'clock A. M.

All present and the jury in the box.

Proceedings continued as follows:

W. G. GOOD, on the stand.

CROSS-EXAMINATION (Resumed)

By MR. McCORD:

Q Mr. Good, you stated that you made certain investigations over in Montana as to the reality of these various payees named in the checks; did you make any investigation in any other state as to those that were issued fraudulently, covering surveys, purported surveys, in the state of Washington or the state of Idaho?

A I only took up those in Montana and the ones here he was supposed to have been working on at the time that he was arrested.

RE-DIRECT EXAMINATION

By MR. McLAREN:

Q Mr. Good, you say you investigated his reports at Colville on the Colville Reservation where he was supposed to be working at the time he was arrested?

A Yes sir.

Q Where was Mr. McCoy staying at the time he was supposed to be working at Colville?

A Right here in this city.

Q How long had he been staying here?

A All that summer.

Q The summer of 1909?

A Yes sir.

Q Now, you testified on cross-examination of Mr. McCord,

that you made an examination over in Montana and then later interviewed Mr. McCoy himself in Seattle. I want to ask you, Mr. Good, if you made an investigation regarding Mr. McCoy's work and reports at Great Falls, Montana?

A I did so far as trying to locate the employees that he was supposed to have working for him.

Q Did you make an investigation there to find J. D. King?

A I did; I think his address was Great Falls.

Q Did you find him?

A No sir.

Q Did you find F. M. Clark?

A I did not.

Q A. J. Whitney

A I did not.

Q D. H. Sullivan?

A I did not.

Q S. F. Cady?

A I did not.

Q All of those names were supposed to be the names of employees at or near Great Falls, were they not?

A Their postoffice address was given as Great Falls.

Q On the voucher that you spoke about?

A Yes sir.

Q Now, did you make a similar investigation at Culbertson, Montana?

A I did as to two or three parties there.

Q You mean as to the parties supposed to be employed at that place?

A Yes sir.

Q Did you find there any George D. Cook?

A I did not.

Q Or F. M. McCulley?

A I did not.

Q Did you make a similar investigation at Benton or Fort Benton, Montana?

A I did as to one man I think there.

Q What man was that? To refresh your memory was that H. M. Benson?

A That is the name, yes sir.

Q Did you find H. M. Benson?

A I did not.

Q What effort did you make to find any such person?

A I made every effort possible to locate a man in a place of that kind by making inquiries from business men, the post-master and so forth, men that have lived there for years that I knew of and supposed to know every one in the community, made a diligent search.

Q Now, at the Colville Reservation in the State of Washington, Mr. Good, you say you made an investigation of Mr. McCoy's supposed work and employees?

A I did.

Q Did you investigate to learn whether one A. C. Jenkins was a real or fictitious person at Colville or near there?

A I did.

Q Did you find any such person as A. C. Jenkins?

A I couldn't locate him at all.

Q You used the same methods of investigation there as you have described already?

A Yes sir.

Q What did you find as the result of these investigations as to whether or not Mr. McCoy himself had been on these public surveys doing the work that was indicated in his reports?

A I couldn't learn that he had been on the ground himself at all.

Q You couldn't learn that he had been on the ground at all?

A No sir.

Q And it was after making an investigation, as you have just testified to that you then came over and interviewed Mr. McCoy himself?

A Yes sir; all my evidence was negative, I couldn't locate a single man that was supposed to be employed by Mr. McCoy,

I couldn't learn where he had been on the ground himself and I simply had to confront Mr. McCoy in relation to it.

(Witness excused.)

MR. McCORD: I will have an opportunity, Your Honor, as I understand the stipulation, including the Court, to file an exception and have a bill of exceptions to all of this testimony or such parts of it as I want in the bill of exceptions.

THE COURT: I will allow that.

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "H" a copy of the indictment in the case of the United States of America vs. M. P. McCoy, returned by the Grand Jury on the July term of 1909.

MR. McCORD: September 17th.

MR. McLAREN: Returned September 17th, 1909, to which the defendant pleaded guilty on the 28th of September. There is no objection by counsel.

THE COURT: It will be admitted.

Copy of indictment referred to admitted in evidence and marked Plaintiff's Exhibit "H".

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "I", certified copy—

(Paper handed to counsel for defendant.)

MR. McCORD: I object to the offer on the ground that it is irrelevant, incompetent and immaterial.

I further object to it, Your Honor, upon the ground that the purported letter, directed to the cashier of the National Bank of Commerce, of Seattle, Washington, dated February 7th, 1903, purports to carry with it certain instructions and a circular containing the regulations issued by the treasury department under date of December 7th, 1906. It shows upon its face that the letter appointing the National Bank of Commerce a United States depository is dated February 7th, 1903. Now, they attach to the letter dated February 7th, 1903, a list of regulations dated December 7th, 1906, made three years after the letter, which purports to carry with it the transmission of the departmental regulations. I object to it upon the further

ground that in 1903 the National Bank of Commerce, while there was a National Bank of Commerce in existence at that time, in 1906 the National Bank of Commerce that was then in existence went out of business by a consolidation with the Washington National Bank under the name of the National Bank of Commerce, so that this letter is objectionable for the two reasons: First, that there ought not to be permitted to go to this jury any departmental regulations bearing date after the letter of transmission establishing the depository, unless it is shown that they were sent after they were printed. There is no presumption that because a United States depository was created in 1903 regulations bearing date three or four years later were ever mailed to them; and besides, as I say, the National Bank of Commerce, to whom this letter was addressed, happens to have the same name that the present National Bank of Commerce has, but the date of the organization of this bank is of a later date, established in 1906, and the burden is on the plaintiff to prove that the bank that was established in 1906, or the one that they are suing, when it was established. I object to it as irrelevant, incompetent and immaterial, not the best evidence, hearsay, and wholly immaterial to any of the issues in this case, and extremely prejudicial to the defendant in this action if permitted to be introduced in evidence.

MR. McLAREN: If the Court please, the fact that the original National Bank of Commerce may have seen fit to consolidate itself with some other bank, but preserved the same name, admitting, as counsel says, that it was a national bank throughout that period, including the period of this letter, ought not to have any bearing upon the admissibility of this letter. It might be possibly a defense, but those facts are not in evidence yet if they are admissible at all. Now, as regards the circulars which are attached to this letter, it is true there does appear a discrepancy in the date, the letter bearing date, February 7th, 1903, and the circular, December 7th, 1906. These circulars do, however, cite that they are intended to in-

clude the previous circulars of 1897 and April 17th, 1899, respectively. Does the Court wish to examine the letters?

THE COURT: Yes.

(Papers handed to the Court.)

THE COURT: To introduce this circular you will have to have some proof that it was received or at least transmitted to the bank.

MR. McCORD: I add to my objection, furthermore, that there is no proof of the mailing of the letter.

MR. McLAREN: I would like to make the further suggestion, Your Honor, that public regulations of the department, such as those, would be taken judicial notice of in any event as being a departmental regulation issued under the executive authority of the departments of government.

MR. McCORD: That doesn't make law. It is not binding on the defendant in a case like this.

(Further Discussion.)

THE COURT: The Court is required to take judicial notice of regulations made by the departments of the Government authorized by law, and so far as those regulations conform to the law and are not contrary to the law and do not invade rights that exist under the law, they are valid regulations and have the force of law. It may be in determining the law of this case that the Court will have to consider the question whether there is anything in these regulations that are not binding by reason of attempted exercise of unauthorized power or deprivation of legal rights. Under the statute public funds are required to be kept on deposit with the treasurer of the United States or an assistant treasurer, but in places where there is no treasurer or assistant treasurer, the secretary of the treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of any public money in any other public depository or in writing authorize the same to be kept in any other manner and under such rules and regulations as he may deem effectual to facilitate payments to public creditors. That is a part of the statute, Sec-

tion 3620, of the United States Revised Statutes. This defendant is not the treasurer or an assistant treasurer and could only receive and hold and disburse public money by virtue of this last clause of Section 3620, and would be bound to observe the lawful regulations made by the Secretary of the Treasury.

MR. McCORD: If it has the force and effect of law, Your Honor, then it is not admissible in evidence, but it is the duty of the Court to instruct the jury what the law is, treating that as a part of the law. I object to the entry on that additional ground, that the Court will not send to the jury statutes of law, but tell the jury what the law is when the case is submitted. A certified copy of the statute is not admissible in evidence. It is for the Court.

MR. McLAREN: I make this suggestion upon that point: That the sending of that certified copy of the regulations could not be of any prejudice to either party. On the other hand, a failure to do so might result, if counsel's first position is correct, in an error in the record in the trial of this case. I think it would obviate a possible mistrial if it is permitted to go in.

THE COURT: I consider these circulars as matters for the information of the Court only. You may read into the record the letter dated February 7th, 1903, and this paper will not be submitted to the jury as an exhibit in the case. Simply that letter may be read in.

MR. McCORD: I object to that, Your Honor, because there is nothing in the certificate to show that the letter was ever mailed. I don't know that the government stands in any better position than an individual. Proof of the mailing of the letter would be necessary by somebody.

THE COURT: I will overrule the objection.

MR. McCORD: My objection goes to the ruling of the Court on the question of these departmental regulations.

THE COURT: Yes.

MR. McCORD: That is all of the objections that I have made goes to the whole matter, Your Honor.

THE COURT: Exception allowed.

MR. McLAREN: I wish to read now to the jury the letter from the treasury department of Washington dated February 7th, 1903: "Cashier, National Bank of Commerce, Seattle, Washington. Sir: In compliance with the wish, orally expressed by Mr. H. C. Wallace, a director, the National Bank of Commerce of Seattle, Washington, now a depositary of public moneys for temporary service, is hereby made a depositary for regular purposes, except receipts and customs, and specially designated under the provisions of Section 3620, Revised Statutes of the United States, for the reception, safe keeping and disbursement, according to law, of the funds advanced to disbursing officers of the Department of the Interior. The receiver of public moneys at North Yakima and Waterville, Washington, have been instructed to deposit their receipts and keep their disbursing accounts with your bank. The additional blanks which will be needed by you on account of this designation have been sent to you and your attention is invited to the instructions printed thereon as well as to the circular instructions herewith enclosed. Your bank is hereby authorized to hold a fixed balance equal to the par value of its secured bonds, viz., \$300,000, and you will remit to an assistant treasurer of the United States each day from the balance standing to the credit of the Treasurer of the United States for deposit on account of 'Transfer of Funds' a sufficient sum to reduce your total balance to said amount of \$300,000. Respectfully, L. M. Shaw, Secretary." And attached to it is the seal of the Department.

I now offer in evidence as Plaintiff's Exhibit "J" certified copies of certain letters of instruction from the Department of the Interior, General Land Office, Washington, to M. P. McCoy, Examiner, having particular reference to the page that I have turned down in the margin.

MR. McCORD: I object to the offer as irrelevant, incompetent and immaterial; on the further ground that there is no proof that the copies of the letters purporting to be offered here were ever mailed to Mr. McCoy as examiner, and so far as this

controversy is concerned between the Government and the defendant bank, any communications or any letters passing between the Government and Mr. McCoy would be purely hearsay and outside of the record, and not the best evidence.

MR. McLAREN: The Court will recollect that the deposition of Mr. McCoy showed that he had burned and destroyed all of his letters of instruction, and upon an attempt being made to have him testify in substance what they were, this very objection was made, that the files in Washington would be the next best evidence. I now offer this in evidence particularly, and only the part that I have turned down in the margin for this purpose, if I may be permitted to state the substance of that: That the testimony shows that during the summer of 1909 Mr. McCoy was stationed here at Seattle all the time, although he was supposed to be engaged in the examination of the public land surveys in the eastern part of this state, and also in Montana, and the letter which I am now offering in evidence is his authority not only to go over there, but to transport his assistants over there to those points. The vouchers which I offered in evidence contain the expense accounts of these two fictitious assistants whom he did transport according to his vouchers, and for which he did get pay from Seattle over into the eastern part of this state, and I guess over in Montana as well. This is the very evidence that counsel said yesterday was the best evidence. I now offer it.

THE COURT: The obligation of this defendant was to receive, safely keep and disburse public money according to law and regulations. The bank was not required to exercise supervision over the disbursing officers or to insure the Government against embezzlement or loss of funds by misappropriation or for expending the money for improper purposes. The duty of the bank was to pay the checks that were properly drawn by an authorized person, a person authorized to draw them, and pay the money to the payees or to the order of the payees's name in the check. The bank could not know and was not required to know, whether the payments were proper pay-

ments. It had to know that the payments were made as authorized by the checks. I think you are loading this case up with unnecessary matter in endeavoring to prove that these payments were fraudulent to the extent of being drawn for services that were not rendered or supplies that were not furnished. The bank did not have to inquire about them and was not in a position to know. The bank was in a position to know that the payees who presented the checks or got the money or indorsed them were properly identified.

MR. McLAREN: I call the Court's attention to the fact that one of the defenses set up was that the Government did receive value received for these checks, although they were fraudulently issued.

THE COURT: Well, when you reach that the Court will have to rule on it, but in making your case in chief you are not required to anticipate that defense. I will sustain the objection on the ground that this document is irrelevant. It is not a necessary part of the proof that the Government is required to introduce. I think it is the defendant's case in chief.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

MR. McLAREN: In order to facilitate matters, if the Court please, I now offer to prove by one other witness what the fixed, settled policy and practice of the Department of the Interior was as to their method of examining and checking up the surveys that were made from time to time of the Government's public lands. It may be that the Court will rule that this is anticipating the defense, and if so I make this offer in this way; if not I will put my witness on the stand.

THE COURT: I think it is anticipating the defense, and it is out of order at this time.

MR. McLAREN: I simply want to protect myself against being cut off by rebuttal.

THE COURT: Yes.

MR. McLAREN: Plaintiff rests.

PLAINTIFF RESTED

MR. McCORD: I now at this time, Your Honor, move for a non-suit and dismissal of this action for the reason that the plaintiff has wholly failed to establish the allegations of the complaint and has failed to establish any cause of action that would be binding upon the defendant, and the condition of the evidence is such that if a verdict were rendered in favor of the plaintiff it would be the duty of the Court to set it aside.

(Argument by Mr. McCord.)

THE COURT: I will not decide this motion before two o'clock. Gentlemen of the jury, you may be at ease until two o'clock. I am not excluding you from hearing this if you want to hear it, but you may be excused from attendance until two o'clock if you want to go. The instructions I have given you at other times of adjournment are to be remembered by you and to be heeded by you as now repeated.

(The jury retired.)

(Further argument by respective counsel.)

THE COURT: I want to take time to read some of these authorities; the case in 214 United States.

(Respective counsel cited authorities to the Court.)

THE COURT: As the matter rests in my mind now, it seems to me like a difficult point to get over in this case would be that the checks were not returned. The right to recourse against the banks through which these checks came to the defendant bank would, according to ordinary banking rules, depend upon the return of the endorsed paper, and the Government is held to observe the business rules which obtain with business men in business transactions, and the Government is not allowed to assert a right while committing a wrong. If it was wrong to withhold these checks, it is not right to make the defendant bank pay.

(Recess until two o'clock P. M. same day.)

March 13, 1912, 2 o'clock P. M. All present and the jury in the box. Proceedings continued as follows:

THE COURT: I want to see those checks.

(Papers handed to the Court.)

THE COURT: I want the letter of instructions that accompanied these circulars that was received this morning.

(Papers handed to the Court.)

THE COURT: How did the money get into the bank? Was the money deposited there to the credit of Mr. McCoy or did he receive drafts and deposit the drafts?

MR. McLAREN: It was sent directly to the bank, Your Honor.

MR. McCORD: Deposited to the credit of M. P. McCoy as special examiner, or examiner of surveys and special disbursing agent, I think.

MR. McLAREN: (Handing papers to the Court.) Those are certified copies of the several warrants that were sent to the bank. They are not introduced in evidence. I neglected calling Your Honor's attention to the fact that the checks for the year 1909, none of them contain in the margin any items as to the purpose for which they were drawn, which is contrary to the regulations submitted to you, and which provide that the bank shall refuse payment of checks unless it complies with that.

THE COURT: How did these checks get into the possession of the United States?

MR. McLAREN: The custom between the United States and the bank was this: that after the checks were turned into the bank and canceled for payment they were sent in to the Department at Washington every month or every quarter, as the case might be, I think every quarter, and transmitted along with a statement from the bank to the Department, and upon the representation of those canceled checks and the statements accompanying them from the bank the settlement was made from time to time between the Department and the bank. As to the checks for July and August, 1909, you will recollect that the witness testified they were still in the possession of the bank at the time the investigator spoke to the bank officially

about it when he was making his investigation before Mr. McCoy was arrested.

THE COURT: All those checks returned or sent to the accounting department accompanying statements of the account, they show on their face that they did not comply with the regulations, not having indorsed or indicated thereon the purpose for which the check was issued.

MR. McLAREN: That is true, Your Honor.

THE COURT: That would be notice to the Government, if the Government accepted those returns without question or within a reasonable time, it would preclude the Government, I think, from denying the right of the bank to pay the check on that ground for a non-compliance with that regulation. So far as the government had notice or can be presumed to have had notice of what the transactions really were, it is like any other party dealing with commercial paper to observe the laws that fix and determine the rights and liabilities of the parties in handling commercial paper. When a depositor receives a statement of his account in the bank, accompanied by checks that have been paid, and he fails to give notice promptly of any checks that are spurious or payment improperly made, it becomes an account stated, it cuts off any dispute about those matters after a lapse of a reasonable time to show up errors, discrepancies.

MR. McLAREN: Might I suggest that that doctrine could not apply to the Government as a depositor, except predicated upon this theory: That the oversight or neglect of some subordinate in the department at Washington could have the effect of nullifying the printed regulations issued by the Secretary of the Treasury?

THE COURT: The case in 214 United States decides one point, and that is that the rule requiring prompt notice to be given of the invalidity of commercial paper is an exception to a general rule, the general rule being that where money is paid by mutual mistake that the mistake can be corrected and the matter adjusted according to the rights of the parties.

Now the exception that is made in the law is where notice of a mistake is not promptly given and after a lapse of reasonable time, if no notice is given, the party who has made the mistake is protected against bringing up the matter to be readjusted.

Now, the Supreme Court decided that that exception does not apply except in those matters where the party who should give the notice is in a position to have knowledge of the mistake. It does not apply as against the Government when checks are paid on fraudulent indorsement of payees, because the Government does not know the payees, does not know their signatures, is not in a position to have the information so as to give notice of a mistake of that kind; therefore, the rule does not apply. The argument to be drawn from that is that, in accordance with other decisions of the Supreme Court of the United States, the Government is bound by the business rules that apply to the handling of commercial paper. As said by Judge Miller, the Government itself is as much interested, if not more interested, than anybody else, in the value of confidence in handling commercial paper, and for that reason it is as much bound as private individuals are to the reasonable rules of business that are prescribed and followed for the protection of people who repose confidence in handling commercial paper. The defendant was not obligated to pay any of these checks except on presentation at its banking house in Seattle by the payee, and upon being satisfied of his identity, but in accordance with commercial usage, it acted with reasonable business prudence in taking these checks, accompanied by an endorsement which guaranteed or warranted the genuineness of the signature of the payee; I mean taking these checks from another bank; and having done so it is entitled to be treated fairly in the matter of protecting its rightful recourse against the prior indorsers. I think essential to that right was the return of the checks or a tender of them. If I am not greatly mistaken in my understanding of banking business and the rules of law, this defendant upon being informed that

the payees named in these checks were fictitious persons, and the endorsements of their names on the checks were forgeries, and that the checks were in the custody of the United States District Attorney, and that permission would be given to inspect them and take copies therefrom, would not on receipt of that notice or that kind of information have any legal ground to go to another bank from which the check had been received with guarantee and say, "Here, that guarantee of yours has caused me to lose money and I require you to pay back the money that I paid on this check"; I don't believe the defendant bank could go to another bank and make a demand of that kind on that kind of showing or that state of facts. It would have the right to take the check and throw it down on the counter and require the money to be refunded on it. I will grant the motion for a non-suit.

MR. McLAREN: Just a moment, if the Court please. The state of facts which Your Honor suggests I think would not be applicable to the checks for the months of July and August, the last two months issue of the checks, for the reason that as testified to by Inspector Good, those checks were still in the possession of the National Bank of Commerce at the time he made his investigation, and at that time he told the bank the facts and the transactions relative to Mr. McCoy.

MR. McCORD: He did not so testify. He said he went there and asked for the checks and they were given to him by the bank.

MR. McLAREN: Yes, for the months of July and August.

MR. McCORD: And then they were forwarded on to Washington.

THE COURT: Did he take them up?

MR. McLAREN: No, he didn't.

MR. McCORD: They were forwarded to Washington, just the same as the other checks.

THE COURT: They were forwarded before any—

MR. McCORD: Before any demand was made, according to the evidence, on the 5th of March.

THE COURT: They were in the possession of the Government when this suit was commenced?

MR. McCORD: Yes.

MR. McLAREN: Yes, they were when the suit was commenced, but they were in the possession of the bank when the McCoy transactions were first brought to their attention by the investigation of Mr. Good. This point was not suggested on demurrer to the complaint, and I would therefore ask the permission of the Court to reopen the case for this purpose and for this purpose only. I would like to have it reopened for the purpose of offering to prove that Mr. Good at the time he was in the bank did inform the banking officials as to the McCoy transactions, and for the further purpose of offering in evidence the notice which was sent to the bank before suit was commenced, in which we offered to permit them to inspect all of these checks at the office of the United States Attorney. That offer may affect the state of the record on appeal, while it may not affect Your Honor's decision.

THE COURT: I will allow you to reopen the case for that purpose.

W. G. GOOD, being recalled as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. McLAREN:

Q Mr. Good, you have testified already that you called at the National Bank of Commerce of Seattle at the time you were making the investigation regarding Mr. McCoy. Do you recollect which ones of these checks now in evidence, if any, the bank still had in its possession at that time?

A They had the checks that were issued for July and August.

Q Of 1909?

A Two months, yes sir.

Q What statements, if any, did you make to the officials

of the bank at that time regarding those checks, regarding Mr. McCoy's transactions?

A I secured the checks—

MR. McCORD: I object to that as to any statements he made so far as their being binding upon this defendant is concerned. This witness was trying to get evidence against Mr. McCoy. He was not authorized by the United States to bind the United States by any representations he might have made.

MR. McLAREN: I am proving notice to the bank, Your Honor.

THE COURT: I will overrule the objection.

MR. McCORD: Exception.

A (Continuing.) Well, in the first place, of course when I approached the bank I told them what my purpose was and what I was there for, that I was investigating Mr. McCoy's business methods, and if I remember right, I had a letter to the bank by Mr. Todd I think, issued by Mr. Todd; however, they were very frank and secured these checks for July and August, and I had them in my possession for three or four days.

Q And you returned them to the bank?

A I returned them to the bank and after—I think it was after Mr. McCoy pled guilty and I advised them of what took place in connection with Mr. McCoy and that those checks were fraudulent and that he admitted it, and so forth.

Q And you told the banking officers, did you, that the checks were fraudulent?

A Oh, yes.

Q And in what way they were fraudulent?

A Yes sir, I gave them the history of the whole case and the transactions in connection with my investigation at that time.

Q You left the checks in their possession?

A Oh yes, I returned them.

CROSS-EXAMINATION

BY MR. McCORD:

Q Whom did you have your conversation with?

A Now, I can't recall the gentleman's name; there was two men, one man had charge of the Government's disbursing accounts, and then there was a young man there, either assistant cashier—I can't recall his name now.

Q It was not an officer of the bank; you don't know whether it was or not?

A He had some title, assistant cashier I think he was.

(Witness excused.)

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "K" a—

(Paper handed to Mr. McCord.)

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "K", a certain letter dated March 4, 1910, addressed to the National Bank of Commerce, by the United States Attorney of Seattle, accompanied by a list of all the checks in dispute, which letter offers the bank permission to examine the checks at any time by its officials or by its attorneys.

MR. McCORD: I object to it as irrelevant, incompetent and immaterial.

MR. McLAREN: You will find the return of the Marshall attached to the letter, showing service on the bank.

THE COURT: I overrule the objection. It may be admitted.

Letter referred to admitted in evidence and marked Plaintiff's Exhibit "K".

C. W. McKERCHER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McLAREN:

Q Your name is C. W. McKercher?

A It is.

Q You are a clerk in the United States Attorney's office?

A Yes sir.

Q Do you recollect any official or employee of the National Bank of Commerce calling upon you in response to this letter which I hand you, Exhibit "K"?

A I don't know that it was in response to that letter; Mr. Brownell, Chief Clerk at the bank, called.

Q For what purpose did he call?

MR. McCORD: I object to that as incompetent, irrelevant, immaterial and hearsay. The clerk of the bank would not be able to bind this bank.

THE COURT: I overrule the objection.

A He called to see the indorsements on the checks.

Q The indorsements on these checks in dispute in this case?

A Yes sir.

Q Did you show him those checks?

A I did.

Q Did you show him all of them?

A I did.

Q Do you recollect how soon after the date of that letter, March 4, 1910, this happened?

A No, I do not.

Q Would you say it was shortly afterward?

MR. McCORD: I object to that as leading.

THE COURT: Overruled.

A It was at the time that Mr. Todd was in Washington during the Ballinger-Pinchot controversy; I don't know the date of it except in that way.

MR. McCORD: That was in June, wasn't it?

THE WITNESS: I don't recall the date.

MR. McCORD: I saw Mr. Todd in Washington, that is how I happen to know.

Q Did Mr. Brownell or anybody else for the bank at that time or any other time make any demand upon you for the possession of the checks?

A He did not.

Q He made an examination of all of them?

A As many as he wished.

Q You offered him to inspect all of them?

A I did.

CROSS EXAMINATION

BY MR. McCORD:

Q That was some several months after March 4th?

A Yes sir.

(Witness excused.)

MR. McCORD: I now renew my motion for a non-suit on the same ground, Your Honor.

THE COURT: The motion is granted.

MR. McLAREN: The Court will allow us an exception.

THE COURT: Exception allowed. The Clerk will enter an order granting a non-suit. The jurors are all excused from attendance until tomorrow morning at ten o'clock.

*In the United States Circuit Court for the Western District of
Washington, Western Division.*

The United States of America,
Western District of Washington—ss.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. P. McCOY,

Defendant.

No. 1933.

INDICTMENT.

Violation of Sec. 5488 R. S.

JULY TERM A. D. 1909.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Western District of Washington, upon their oaths present:

That one M. P. McCoy, heretofore, to-wit: On the 31st day of March, 1909, and at various times between that date and the first day of September, 1909, in the City of Seattle, in said District, being then and there an examiner of surveys employed by the General Land Office of the United States, and as such officer being at said times and place a disbursing officer of the United States and entrusted with certain public moneys of the United States; did, by virtue of his said office and employment and while so employed and acting as such disbursing officer of the United States, receive and take into his possession certain public moneys of the United States, to-wit: the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States of America, then and there the property of the United States, a more particular description of which money is to the Grand Jurors unknown; and the said M. P. McCoy did then and there wilfully, unlawfully and feloniously embezzle and convert to his own use said public moneys of the United States, to-wit, the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States, a more particular description of which money so embezzled as aforesaid, being to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,
United States Attorney.

Witnesses examined before Grand Jurors: Elmer E. Todd.

Indorsed: Indictment for Violation Sec. 5488 R. S. Case No. 1933. Plaintiff's Exhibit II. United States District Court. Western Dist. of Washington. Filed March 13, 1912. A. W. Engle, Clerk.

4-207-r.

ETDB

DEPARTMENT OF THE INTERIOR
WTP GENERAL LAND OFFICE
WASHINGTON

February 28, 1912.

I hereby certify that the annexed copies of letters from this office addressed to M. P. McCoy, Examiner, are true and literal exemplifications of the official record of said letters in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

H. W. SANFORD,

(Seal of Recorder of the General Land Office.
United States General
Land Office)

Plaintiff's Exhibit "J" offered but not admitted in evidence.

In Reply Please Refer to
"E"

4"WB
172408
1907

DEPARTMENT OF THE INTERIOR C L D B
GENERAL LAND OFFICE

Washington, D. C., October 15, 1907

ADDRESS ONLY THE

Commissioner of the General Land Office

SCHEDULE OF COLVILLE ALLOTMENTS.

Mr. M. P. McCoy,
Examiner,

Seattle, Washington.

Sir:

Your letter of October 3, 1907, is received, reporting receipt of data from Olympia, and non-receipt of instructions, which

must have reached you soon after said date. I transmit herewith a copy of all the remaining parts of the Colville schedule of Indian allotments, which have not heretofore been supplied for your use in verifying and reporting their condition.

Of the 14 townships represented, six are still unsurveyed, and in those you are not required to investigate. Three tracts are in Tp. 39, R. 33, which you have already examined, but they were not found and reported by Deputy Shelton; so it is necessary to examine their status, and report as to the necessity of a correction survey. Allotment No. 278 for E. Dupuis appears also omitted from the survey of section 34, Tp. 37, R. 33.

As you state you are not informed as to what townships have been suspended for segregation, you are now advised that a general suspending order was telegraphed to the Waterville and Spokane offices Sept. 20, 1906, affecting *all public lands* in the north or ceded part of the Colville Reserve, besides orders by letters specifying various townships.

Very respectfully,

FRED DENNETT,
Acting Commissioner.

JCP

In Reply Please Refer to

"E

WTP

208772-1907

DEPARTMENT OF THE INTERIOR C L D B
GENERAL LAND OFFICE

Address only the Washington, December 11, 1907.
Commissioner of the General Land office
Schedule of Indian Allotments.

Mr. M. P. McCoy,
Examiner of Surveys,
Seattle, Washington.

Sir:

I transmit herewith, as requested in your letter dated November 24, 1907, a copy of the schedule of Indian allotments in

T. 40 N., R. 32 E., Washington, transmitted with your letter dated June 2, 1907.

Very respectfully,

FRED DENNETT,
Assistant Commissioner.

L.J.

In Reply Please Refer to

E

WTP

211973-1907

DEPARTMENT OF THE INTERIOR C L D B
GENERAL LAND OFFICE

Washington, D. C., December 13, 1907.

Address only the

Commissioner of the General Land office.

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Seattle, Washington.

Sir:

Upon completion of the work in connection with the Indian allotments in the ceded portion of the Colville Indian Reservation, Washington, you are requested to prepare and transmit your detailed report of the examination of the survey of the standard lines in the diminished reservation, executed by Witham and Whitham, D. S., under their contract No. 635, examined by you last spring.

The returns of said survey have been pending in this office for some time and it is desired that action may be taken thereon at the earliest practicable date.

In connection with the work upon which you are now engaged, it is noted that a description of the allotments in the following unsurveyed townships has been furnished you:

Tps. 36 N., Rs. 29 and 30 E.

Tps. 35, 39 and 40 N., R. 31 E.

T. 40 N., R. 35 E.

Tps. 35 N., Rs. 36 and 37 E.

Your present orders are not intended to cover any investigation of the allotments in these townships, as it will be the duty of the deputies who are to make the surveys therein to segregate said allotments from the public lands.

Very respectfully,

FRED DENNETT,
Assistant Commissioner.

L.J.

In Reply Please Refer to
E
WTP
208656-1907

DEPARTMENT OF THE INTERIOR CLDB
GENERAL LAND OFFICE

Washington, D. C., December 19, 1907.

Address only the
Commissioner of the General Land Office
Instructions to Examiner of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Seattle, Washington.

Sir:—

I transmit herewith for examination as to the bona fides of the alleged settlers the applications for the survey of T. 39 N., R. 31 E. and T. 21 N., R. 9 E., Washington. The surveyor general has, by letter of even date herewith, been directed to transmit to you direct such other applications as may be received.

Very respectfully,

FRED DENNETT,
Assistant Commissioner.

L.J.

In Reply Please Refer to

W.T.P.

E

WTP

218705—1907.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C., December 26, 1907.

Address only the

Commissioner of the General Land Office

INSTRUCTIONS TO EXAMINER OF SURVEYS

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

I transmit herewith for examination as to the bona fides of alleged settlers the applications for survey of T. 37 N., R. 40 E., Washington.

Very respectfully,

FRED DENNETT,

L.J.

Assistant Commissioner.

In Reply Please Refer To

E

DEPARTMENT OF THE INTERIOR C.L.D.B.

W.T.P.

221864-1907. GENERAL LAND OFFICE

Washington, D. C., January 7, 1908.

Address only the

Commissioner of the General Land Office

Indian allotments: Colville Indian Reservation.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

In reply to your letter dated December 18, 1907, relative to allotment No. 65, Agnes, in T. 40 N., R. 32 E., Washington, you

are advised that the proper description of said allotment is as follows: W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ section 35 and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ east of Kettle River in section 35 and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ east of Kettle River in section 26, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 26 and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ east of Kettle River in section 26, said township. Any other description furnished you is incorrect.

The allotment No. 11 of Leo Tonasket has been properly shown upon a supplemental plat approved March 1, 1907, and it appears that no further action is necessary in connection therewith on the part of this office, the facts contained in your letter dated June 2, 1907, relative thereto having been submitted to the Indian office with my letter dated June 15, 1907, and no further action seems to have been taken.

Very respectfully,

FRED DENNETT,

Assistant Commissioner.

L.J.

In Reply Please Refer To

DEPARTMENT OF THE INTERIOR C.L.D.B.
GENERAL LAND OFFICE

W.T.P.

198421-221863
1907

Washington, D. C., January 9, 1908.

Address only the
Commissioner of the General Land Office
Instructions to Examiner of Surveys

Mr. M. P. McCoy,
Examiner of Surveys,
Seattle, Washington.

Sir:

In reply to your letter dated November 6, 1907, relative to the survey of allotment No. 33, Julia Chesaw, in section 21, T. 40 N., R. 30 E., you are directed to submit your field notes of

survey to the surveyor general for transcribing and platting if you have not already done so.

Your action in proceeding with the examination of such surveys as can be reached at this season of the year, as reported in your letter dated December 18, 1907, is approved.

Upon completion thereof, you will prepare and submit your reports, after which you will proceed with the examination of *bona fides*.

Very respectfully,

FRED DENNETT,
Assistant Commissioner.

L.J.

In Reply Please Refer to

"E"

36199-1908

WTP

DEPARTMENT OF THE INTERIOR C L D B
GENERAL LAND OFFICE

Washington, D. C., March 6, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

In reply to your letter dated February 16, 1908, requesting instructions as to further work, you are hereby directed, upon receipt hereof, to proceed to western Montana and examine the *bona fides* of settlers in the following townships, the applications for the survey of which are herewith transmitted under separate cover:

Group No. 1.

Ts. 1 N., Rs. 21 and 22 W.

T. 2 N., R. 19 W.

Tps. 3 and 4 N., R. 21 W.

Tps. 1 S., Rs. 21 and 22 W.

Tps. 2 and 3 S., R. 22 W.

Group No. 2.

T. 26 N., R. 22 W.

T. 29 N., R. 18 W.

Tps. 31 N., Rs. 20 and 24 W.

Tps. 32 N., Rs. 20, 21, 22 and 28 W.

tps. 33 and 34 N., R. 27 W.

Group 3.

Tps. 25 N., Rs. 33 and 34 W.

A map of Montana and a supply of blanks for reports are herewith transmitted.

You will take with you your surveying outfit for use in case it should be deemed expedient to later assign to you the field examination of certain surveys in Montana.

Very respectfully,

FRED DENNETT,

Commissioner.

J.R.A.

In Reply Please Refer To

“E”WTP

48326 53824

54781 57436

59454

1908.

DEPARTMENT OF THE INTERIOR C L D B
GENERAL LAND OFFICE

Washington, D. C., March 31, 1908.

Address only the

Commissioner of the General Land Office.

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Missoula, Montana.

Sir:

In reply to your letter dated March 17, 1908, you are requested to return to the Surveyor General for Washington all data in your hands relating to surveys in his district and to advise him to hold the same for further investigation.

In addition to the work heretofore assigned you in Montana, you are directed to examine the *bona fides* of applicants for the survey of the following townships in Montana, the petitions therefor being herewith transmitted, viz.:

T. 37 N., R. 2 W., T. 28 E., R. 19 E., T. 37 N., R. 21 E., T. 29 N., R. 36 E., Ts. 30N., Rs. 33 and 34 E., T. 25 N., R. 33 E., and T. 26 N., R. 42 E.

In connection therewith you are directed to obtain the necessary data and examine the survey executed by Fred I. Hubbard, D. S., under his contract No. 510, and, if data is obtained from the surveyor General, that by Parkinson and Douglas, D. S., under their contract No. 517.

Very respectfully,

FRED DENNETT,
Commissioner.

J.R.A.

In Reply Please Refer to
E DEPARTMENT OF THE INTERIOR C.L.D.B.
DB. GENERAL LAND OFFICE

Washington, D. C., April 14, 1908.

Address only the
Commissioner of the General Land office.

Mr. M. P. McCoy,
Examiner of Surveys,
Helena, Montana.

Sir:

I have your letter of the 8th instant in which you ask to be allowed to continue examinations in the State of Washing-

ton, as your wife cannot live in the high altitudes of Montana where you are at present assigned. You fear that your work has not been satisfactory to this office.

In reply you are informed that your services in the State of Washington have been very acceptable and no fault is found with the character of your work.

Your assignment to Montana was owing solely to the necessities of the service, and in the interest of good administration.

No instructions were given you as to a permanent assignment to Montana, but directions were forwarded indicating that your stay in the latter State would probably extend over the coming surveying season.

I regret that I cannot immediately comply with your personal request to return to Washington to continue examinations there as the exigencies of the work may require a longer detention in Montana.

I will, however, endeavor to have your examinations confined, as far as practicable, to the lower altitudes in eastern Montana, which I hope will enable you to prosecute the work with your usual fidelity.

Very respectfully,

L.J.

FRED DENNETT,
Commissioner.

In Reply Please Refer to

"E"

WTP

83637)

83658)1908

83659)

DEPARTMENT OF THE INTERIOR W T P
GENERAL LAND OFFICE

Washington, D. C., May 5, 1909.

Address only the

Commissioner of the General Land Office

Procedure in Examination of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Great Falls, Montana.

Sir:

In reply to your letter dated April 17, 1908, you are hereby authorized to transport your two permanent assistants from the State of Washington to the District of Montana, where you are now engaged in the examination of surveys.

With reference to your proposed examination of surveys executed in northeastern Montana, payable from special deposits by the Northern Pacific Railway Co., you are advised that this office has, by letter of even date herewith, requested the Secretary of the Interior for general authority to authorize examiners of surveys to employ transitmen to organize auxiliary parties and examine surveys under the personal supervision of the examiners and upon the granting of such authority, you will be further advised.

Very respectfully,

FRED DENNETT,
Commissioner.

JCB

In Reply Refer to

"E" DEPARTMENT OF THE INTERIOR C.L.D.B
W.T.P.

83637) GENERAL LAND OFFICE
88700)1908

Washington, D. C., June 18, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Great Falls, Montana.

Sir:

You are advised that under departmental authority dated May 5, 1908, examiners are authorized to employ a competent

assistant as transitman in charge of an auxiliary party under the supervision of the examiner to assist in the examination of surveys, at a salary of \$100 per month and actual necessary expenses of transportation and subsistence. In accordance with your recommendation dated April 21, 1908, you are hereby authorized to employ John D. King as transitman to assist you in the examination of the surveys assigned to you in north-eastern Montana, and as outlined in your said letter. A solar transit, tripod, chain, tape and set of pins has been sent to you at Culbertson, Montana, the receipt for the two boxes sent by express being herewith transmitted. The report of work done by the transitman should be included in your weekly report.

Very respectfully,

H. H. SCHWARTZ,

JCP

Acting Assistant Commissioner.

In Reply Please Refer To

DEPARTMENT OF THE INTERIOR C.L.D.B.

E.

GENERAL LAND OFFICE

W.T.P.

151779-1908

Washington, D. C., August 22, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

In reply to your letter dated August 12, 1908, relative to the examination of surveys in Montana, you are advised that the Surveyor General has been directed to transmit to you at the earliest practicable date the data for the examination of contracts No. 515, A. E. Cumming, D. S., Nos. 530 and 531, Fessenden and Ross, D. D., and No. 542, R. C. Durnford, D. S.

The survey under contract No. 505 within the Fort Peck Indian Reservation is being examined by A. F. Dunnington, Topographer in Charge of the surveys within said reservation.

Weather and flood conditions in the southeastern part of the district early in the season rendered it expedient for examiner Wilkes to take up some of the work which it was thought would be examined by you later, but it is believed that there will be enough completed work in the northeastern part of the state to keep you steadily at work.

The Surveyor General reports the probable early completion of the contracts Nos. 518 and 519, George H. Potter, D. S. and Nos. 526 and 527, Williams and Hertz, D. S.

You will include also the examination of T. 9 N., R. 33 E., Harley J. Riley, D. S., under contract No. 500, Tps. 2 and 3 N., R. 28 E., Page and Page, D. S., contract No. 513 and T. 7 S. R. 24 E., contract No. 512, George L. Elmer, D. S., the same being isolated townships not yet examined.

Mr. Wilkes, whose address is Miles City, Montana, has been directed to confine his operations to the district south of the Yellowstone and east of the Big Horn Rivers and to send to you at Great Falls any data in his hands for the isolated work above referred to.

Very respectfully,

FRED DENNETT,

ALP.

Commissioner.

In Reply Please Refer To.

"E"

W.T.P.

W.T.P. DEPARTMENT OF THE INTERIOR C.L.D.B.
189338-1908

GENERAL LAND OFFICE

Washington, D. C., November 25, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,
Examiner of Surveys,
Great Falls, Montana.

Sir :

In reply to your letter dated November 8, 1908, you are directed, upon the advent of unfavorable weather conditions for the prosecution of field work, to return to Seattle, Washington, and submit your reports.

You are requested to inform the Surveyor General of Montana, upon completion of your field examination of each survey, whether you will recommend the acceptance thereof, or, if corrections are required, to what extent.

Very respectfully,

FRED DENNETT,
Commissioner.

JCP.

OFFICE AUDITOR INTERIOR DEPT.

Feb 28 1912

A.M.9 12 2 4 P.M.

March 4, 1910.

The National Bank Of Commerce,
Seattle, Washington.

Gentlemen :

On behalf of the United States of America, I hereby make demand upon you for repayment of the sum of \$15,129.81, on account of checks which were issued by M. P. McCoy, examiner of surveys and special disbursing agent for the Department of the Interior during the years 1907, 1908 and 1909, which checks were paid by you upon forged endorsements, the endorsement of payee in each instance being a forgery.

Attached hereto is the list of said checks with the date of each, the name of the payee, the amount of each check, and the bank or banks through which it was passed before being paid by the National Bank of Commerce.

All these checks are in my office at the Federal Building and your officers and attorneys will be allowed to inspect them if you so desire.

Respectfully,

ELMER E. TODD,

United States Attorney.

Encl

RETURN OF SERVICE

The United States of America
Western District of Washington—ss.

I hereby certify and return that I served the annexed letter on the therein-named bank by delivering the original thereof to R. R. Spencer, its 1st vice president, personally, at the place of business of said bank at Seattle in said District on the 5th day of March, A. D. 1910.

C. B. HOPKINS,

United States Marshal,

By M. T. McGRAW, Deputy.

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
1	Oct. 14, 1907	Albert Peterson	\$ 20.00	Columbia Valley Bank
2	" 14,	Nels Anderson	20.00	"
3	" 14,	Wm. Jager	60.00	"
4	" 14,	H. Berggren	47.50	"
5	" 31,	F. L. Day	28.00	"
6	" 31,	G. Hoge	28.00	"
7	" 31,	Frank Engberg	96.00	"
8	" 31,	Chas. Lund	78.75	"
9	" 31,	J. D. King	62.00	"
10	" 31,	F. M. Clark	62.00	"
12	Nov. 30,	F. L. Day	52.50	"
13	" 30,	G. Hoge	52.50	"
14	" 30,	Frank Engberg	180.00	"
15	" 30,	Chas. Lund	150.00	"
16	" 30,	J. D. King	60.00	"
17	" 30,	F. M. Clark	60.00	"
19	Dec. 31,	F. L. Day	54.25	"
20	" 31,	G. Hoge	54.25	"
21	" 31,	Frank Engberg	186.00	"
22	" 31,	Chas. Lund	155.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
23	Dec. 31, 1907	F. M. Clark	\$62.00	Columbia Valley Bank
24	" 31,	J. D. King	62.00	"
26	Jan. 10, 1908	F. L. Day	17.50	"
27	" 10,	G. Hoge	17.50	"
28	" 10,	Frank Engberg	60.00	"
22	" 31,	Chas. Lund	50.00	"
30	" 13,	J. D. King	26.00	"
31	" 13,	F. M. Clark	26.00	Seattle Natl. Bank
43	May 6,	John Jabelson	27.50	First Natl. Bank of Havre, Mont.
44	" 6,	John S. Cole	36.00	"
45	" 31,	J. D. King	62.00	"
46	" 31,	F. M. Clark	62.00	"
47	" 31,	A. J. Whitney	54.25	"
48	" 31,	H. M. Benson	125.00	"
49	" 31,	C. A. Thrapp	150.00	"
50	June 10,	H. M. Benson	48.75	"
51	" 10,	C. A. Thrapp	72.00	"
52	" 23,	J. E. Scherer	78.00	First Natl. Bank Glasgow,
53	" 23,	H. M. Benson	63.75	Mont., & Seattle Natl. Bank
54	" 30,	J. D. King	69.33	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
55	June 30, 1908	F. M. Clark	\$60.00	First Natl. Bank Glasgow,
56	" 30, "	A. J. Whitney	54.25	Mont., & Seattle Natl. Bank
57	" 30, "	H. A. Moore	63.00	"
58	" 30, "	D. H. Sullivan	12.25	"
59	" 30, "	Geo. D. Cook	14.00	"
60	" 30, "	F. W. McCulley	14.00	"
61	" 30, "	S. F. Cady	12.25	"
62	" 30, "	H. M. Benson	54.00	"
2	July 31, "	J. D. King	100.00	Seattle Natl. Bank
3	" 31, "	F. M. Clark	62.00	"
4	" 31, "	Geo. D. Cook	62.00	First Natl. Bank Glasgow,
5	" 31, "	F. M. McCulley	62.00	Mont., & Seattle Natl.
6	" 31, "	A. J. Whitney	62.00	Bank
7	" 31, "	H. A. Moore	279.00	"
8	" 31, "	D. H. Sullivan	54.25	"
9	" 31, "	S. F. Cady	54.25	"
10	" 31, "	H. M. Benson	248.00	"
12	Aug. 31, "	J. D. King	100.00	Seattle Natl. Bank
13	" 31, "	F. M. Clark	62.00	"
14	" 31, "	Geo. D. Cook	62.00	First Natl. Bank Glasgow, and Seattle Natl. Bank

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
15	Aug. 31, 1908	F. W. McCulley	\$62.00	Seattle Natl. Bank
16	" 31,	A. J. Whitney	62.00	First Natl. Bank Glasgow,
17	" 31,	H. A. Moore	279.00	Mont., & Seattle Natl.
18	" 31,	D. H. Sullivan	54.25	"
19	" 31,	S. F. Cady	54.25	"
20	" 31,	H. M. Benson	248.00	"
22—A	Sept. 8,	A. Fetters	7.85	Seattle National Bank
22—B	" 30,	J. D. King	100.00	"
23	" 30	F. M. Clark	60.00	"
24	" 30,	Geo. D. Cook	60.00	"
25	" 30,	F. W. McCulley	60.00	"
26	" 30,	A. J. Whitney	60.00	"
27	" 30,	H. A. Moore	270.00	"
28	" 30,	D. H. Sullivan	52.50	"
29	" 30,	S. F. Cady	52.50	"
30	" 30,	H. M. Benson	240.00	"
1	Oct. 31,	J. D. King	100.00	"
2	" 31,	F. M. Clark	62.00	"
3	" 31,	H. A. Moore	279.00	"
4	" 31,	Geo. D. Cook	62.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
5	Oct. 31, 1908	F. W. McCulley	\$62.00	Seattle National Bank
6	" 31,	A. J. Whitney	62.00	"
7	" 31,	H. M. Benson	248.00	"
8	" 31,	(Blank)	54.25	"
9	" 31,	S. F. Cady	54.25	"
11	Nov. 30,	J. D. King	100.00	National Bank of Montana,
12	" 30,	F. M. Clark	60.00	Helena
13	" 30,	Geo. D. Cook	60.00	"
14	" 30,	F. W. McCulley	60.00	"
15	" 30,	A. J. Whitney	60.00	"
16	" 30,	H. A. Moore	270.00	"
17	" 30,	D. H. Sullivan	52.50	"
18	" 30,	S. F. Cady	52.50	"
19	" 30,	H. M. Benson	240.00	"
21	Dec. 31,	J. D. King	100.00	Seattle National Bank
22	" 31,	F. M. Clark	62.00	"
23	" 31,	Geo. D. Cook	62.00	"
24	" 31,	F. W. McCulley	62.00	"
25	" 31,	A. J. Whitney	62.00	"
26	" 31,	D. H. Sullivan	54.25	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
27	Dec. 31, 1908	S. F. Cady	\$54.25	Seattle National Bank
28	" 31,	T. E. Lynch	24.50	"
29	" 31,	Claude J. Perret	24.50	"
30	" 31,	H. M. Benson	276.00	"
31	" 31,	H. A. Moore	279.00	"
1	Jan. 5, 1909	J. D. King	12.90	"
2	" 5,	F. M. Clark	8.00	"
3	" 8,	Geo. P. Cook	16.00	"
4	" 8,	F. W. McCulley	16.00	"
5	" 8,	A. J. Whitney	16.00	"
6	" 8,	D. H. Sullivan	14.00	"
7	" 8,	S. F. Cady	14.00	"
8	" 8,	H. M. Benson	48.00	"
9	" 8,	H. A. Moore	72.00	"
14	Mar. 31,	J. D. King	35.48	"
15	" 31,	F. M. Clark	22.00	"
16	" 31,	Geo. D. Cook	18.00	"
17	" 31,	F. W. McCulley	18.00	"
18	" 31,	A. J. Whitney	18.00	"
19	" 31,	Joe Mikel	14.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
20	Mar. 31, 1909	E. M. Bassett	\$14.00	Seattle National Bank
21	" 31,	Geo. K. Cooper	14.00	"
22	" 31,	Chas. Paine	14.00	"
23	" 31,	H. M. Benson	82.50	"
24	" 31,	A. C. Junkin	72.00	"
1	Apr. 30,	J. D. King	100.00	"
2	" 30,	F. M. Clark	60.00	"
3	" 30,	Geo. D. Cook	60.00	"
4	" 30,	F. W. McCulley	60.00	"
5	" 30,	A. J. Whitney	60.00	"
6	" 30,	Joe Mikel	52.50	"
7	" 30,	E. M. Bassett	52.50	"
8	" 30,	Geo. K. Cooper	52.50	"
9	" 30,	Chas. Paine	52.50	"
10	" 30,	A. C. Junkin	270.00	"
11	" 30,	H. M. Benson	300.00	"
13	May 31,	J. D. King	100.00	"
14	" 31,	F. M. Clark	62.00	"
15	" 31,	Geo. D. Cook	62.00	"
16	" 31,	F. W. McCulley	62.00	"
17	" 31,	A. J. Whitney	62.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
18	May 31, 1909	Joe Mikel	\$54.25	Seattle National Bank
19	" 31,	E. M. Bassett	54.25	"
20	" 31,	Geo. K. Cooper	54.25	"
21	" 31,	Chas. Paine	54.25	"
22	" 31,	A. C. Junkin	279.00	"
23	" 31,	H. M. Benson	310.00	"
25	June 30,	J. D. King	100.00	"
26	" 30,	F. M. Clark	60.00	"
27	" 30,	Geo. D. Cook	60.00	"
28	" 30,	F. W. McCulley	60.00	"
29	" 30,	A. J. Whitney	60.00	"
30	" 30,	Joe Mikel	52.50	"
31	" 30,	E. M. Bassett	52.50	"
32	" 30,	Geo. K. Cooper	52.50	"
33	" 30,	Chas. Paine	52.50	"
34	" 30,	H. M. Benson	300.00	"
35	" 30,	A. C. Junkin	270.00	"
1	July 31,	J. D. King	100.00	"
2	" 31,	F. M. Clark	62.00	"
3	" 31,	Geo. D. Cook	62.00	"
4	" 31,	F. W. McCulley	62.00	"

Bank or Bank through
which check passed.

Seattle National Bank

Amount.

Payee.

Date.

No.

5	July 31, 1909	A. J. Whitney	\$62.00	
6	" 31, "	Joe Mikel	54.25	"
7	" 31, "	E. M. Bassett	54.25	"
8	" 31, "	Geo. K. Cooper	54.25	"
9	" 31, "	Chas. Paine	54.25	"
10	" 31, "	A. C. Junkin	279.00	"
11	" 31, "	H. M. Benson	310.00	"
13	Aug. 31, "	J. D. King	100.00	"
14	" 31, "	F. M. Clark	62.00	"
15	" 31, "	Geo. D. Cook	62.00	"
16	" 31, "	F. W. McCulley	62.00	"
17	" 31, "	A. J. Whitney	62.00	"
18	" 31, "	Joe Mikel	54.25	"
19	" 31, "	E. M. Bassett	54.25	"
20	" 31, "	Geo. K. Cooper	54.25	"
21	" 31, "	Chas. Paine	54.25	"
22	" 31, "	A. C. Junkin	279.00	"
23	" 31, "	H. M. Benson	310.00	"

Indorsed: Ex. "K." 1933. Filed U. S. District Court, Western District of Washington. Mar. 13, 1912. A. W. Engle, Clerk. By S. Deputy.

*In the Circuit Court of the United States for the Western
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933-C
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a corporation,	
<i>Defendant.</i>	

Testimony of M. P. McCoy, a witness in behalf of the plaintiff, taken before

DENTON M. CROW,

United States Commissioner, at Spokane, Washington,

February 19, 1912.

Mr. McLaren, of Todd & McLaren, appearing in behalf of the plaintiff.

Mr. McCord, of Kerr & McCord, appearing in behalf of the defendant.

The United States of America
Eastern District of Washington
State of Washington
County of Spokane.—ss.

The examination of a witness *de bene esse*, beginning on the 19th day of February, 1912, on behalf of the plaintiff, before me, Denton M. Crow, a United States Commissioner in and for the Eastern District of Washington, at my office at the City of Spokane, Spokane County, Washington, in a certain suit now pending in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff, and The National Bank of Commerce, a corporation, is defendant,

M. P. MCCOY, a witness on behalf of the plaintiff, being first duly sworn, on oath deposes and says as follows:

DIRECT EXAMINATION by Mr. McLaren.

Q Your name is M. P. McCoy, is it?

A Yes sir.

Q You were formerly in the Government service?

A Yes sir, as examiner of surveys for the General Land Office.

Q What was your official title?

A Examiner of Surveys and Special Purchasing Agent.

Q Where were your headquarters?

A Seattle.

Q During what period of time did you occupy that position?

A From about 1900 until about two years ago.

Q About November, 1909?

A Yes sir.

Q You held that position continuously during that time?

A Yes sir.

Q What other important position, if any, did you hold prior to that period?

A I was a member of the Geological Survey for the Interior Department.

Q For about how long?

A For about ten years before that.

Q What were your duties as examiner of surveys and special disbursing agent, what was the nature of your work?

A The public lands are surveyed by contract, by deputy surveyors and my business was to inspect their surveys in the field after their finishing their work—checking it up in other words to see if it was correct.

Q About how wide a territory did your duties cover?

A Well I was in the States of Washington, Oregon, Idaho and Montana.

Q And you say that your headquarters were at Seattle?

A Yes sir.

Q What was it necessary for you to do, Mr. McCoy, in or-

der to go around examining these public—these surveys of public lands, what did you have to do?

A To inspect the surveys in the field, which necessitated transportation and assistants and subsistence for the assistants.

Q You were authorized by the Government to employ men for that purpose?

A And to incur all these expenses.

Q Were some of these surveys made in the State of Washington?

A Yes sir.

Q Where for instance?

A Well throughout the state.

Q You got your instructions from Washington, D. C.?

A Yes sir.

Q Were these instructions given to you for each particular survey, or were they in the nature of general instructions which you were to follow out?

A There were general instructions and sometimes special instructions.

Q Under the general instructions, did you have your own option as to the order in which you took up the examination of the different surveys?

A Yes sir.

Q What arrangement was made relative to the payment of the bills that you might incur under your authority for the performance of your duties?

By MR. McCORD:

Q Were these instructions in writing?

A Yes sir.

By MR. McLAREN:

Q What became of these instructions, Mr. McCoy?

A I burned them something like two years ago, when this trouble began, I burned all my field notes and note books and all things of that kind. I had a trunk full and I burned them.

Q Can you give us, briefly, the arrangements you had with

the Government, whereby this money was to be paid for labor, or for services, or material, which you might incur?

MR. McCORD: I object as that is not the best evidence and no proper foundation has been laid for the introduction of secondary evidence.

Q I will ask you this question, Mr. McCoy—From where did you get your instructions regarding the payment of this money?

A From the commissioner of the general land office.

Q Were they oral, or in writing?

A Written.

Q These written instructions, you still have them?

A No sir.

Q What became of them?

A I burned them.

Q I will ask you what your instructions were, as to how you were to pay these men?

MR. McCORD: I object as it is not the best evidence; asking for the contents of a written instrument; there is not shown any reason why the originals cannot be produced. The best evidence would be the files in the Land Office at Washington, or a copy of them.

A My instructions were to pay the necessary expenses to carry out the examination of these different surveys.

Q How were you to pay them?

A I was to pay them as disbursing agent.

Q I mean by check or by cash?

A Well laterly I paid everything—I guess during this period in dispute, I guess, I paid everything by check.

Q On what banks were your checks drawn?

A The National Bank of Commerce of Seattle.

Q You had an account there?

MR. McCORD: I move to strike out the testimony as not responsive to the question, he asked how he was instructed to do and he answered how he did it.

A Yes sir, I had an account with the National Bank of Commerce as Special Disbursing Agent.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

A Yes sir.

Q Now, Mr. McCoy, I will ask you to examine this bundle of checks, which I hand you, and state whether, or not, they were issued by you while you were in the employ of the Government?

A Yes sir.

Q On each check that is your signature, M. P. McCoy, Examiner of Surveys and S. P. A.

A Yes sir.

Q S. P. A.? Special Disbursing Agent.

A Yes sir.

Q Mr. McCoy, what is the meaning of the marginal notation, Voucher Number 6, or Voucher number so and so, on the check, what does that refer to?

A In making my quarterly statement, or rendering my quarterly account to the General Land Office, I submitted a voucher for each check, up until along about in September, or October, or November, 1909.

Q 1908 you mean, Mr. McCoy?

A Yes sir, it was in 1908, from that time on I used a new form of payroll that covered the payroll expenses, but I still used the voucher plan for sustenance and transportation.

Q And supplies?

A Yes sir.

Q Examine these checks again, Mr. McCoy, are the names of the payees real or fictitious persons in each instance?

A Fictitious.

Q That is there were no such persons?

A No sir.

Q Does this apply to each of them to whom these checks were made out?

A Yes sir.

Q Examine the endorsements on the back, Mr. McCoy, and state whose individual endorsement is on the back of these checks, if you know?

A I do.

Q Are these endorsements, one or more on each check, are these the endorsements of real persons or fictitious persons?

A Fictitious persons.

Q Did the Government receive any services, or supplies or anything of value in exchange for these checks?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

A No sir.

Q Did you receive the money on these checks, in each instance?

A Yes sir.

Q For the amount of the check?

A Yes sir.

Q So far as the appearance of these checks go, Mr. McCoy, are they made out in the same form and in the same manner as you made out checks to real persons for real services rendered?

A They are.

Q That is they are apparently regular on their face, are they not?

A Yes sir.

Q I believe I asked you if you made the endorsements on the back yourself?

A Yes sir.

Q Take, for instance, the first check, October 14, 1907, number one, payable to Albert Peterson, you had no such person as Albert Peterson rendering service at that time?

A No sir.

Q You endorsed it Albert Peterson and J. D. King?

A Yes sir.

Q And that way you received the money yourself?

A Yes sir.

Q That statement of fact is true of each check?

A Yes sir.

MR. McLAREN: I offer in evidence this bundle of checks, as plaintiff's exhibit "A."

MR. McCORD: I object as incompetent, irrelevant and immaterial and the instruments not properly identified.

Q You got these blank checks from the National Bank of Commerce when you opened up your account?

A Yes sir.

Q Did the cancelled checks come back to you, Mr. McCoy, or were they sent by the bank to the Department?

A They did not come back to me.

Q Now while you were—During the period that is covered by these checks, you were doing some actual work for the Government, were you not, in the performance of your duties?

A Yes sir.

Q How often were you required to send in reports to the Department in Washington?

A Weekly.

Q Did you send in weekly reports during this period covered by these checks in evidence?

A Yes sir.

Q I believe you testified that these checks, so far as appearance goes, are the same as real checks issued to real persons by you?

A Yes sir.

Q Now you spoke, a moment ago, Mr. McCoy, about a voucher system that was prevalent between you and the Department, I will ask you now to take this bundle of vouchers and examine them, these for the—marked for the month of October, 1907. I will take voucher number six as an example. This purports to be signed by Albert Peterson, for services rendered of the amount of twenty dollars, from October 5th, 1907, to October 14, 1907, and down below that is the signature of M. P. McCoy approving the same,—Is that a genuine or fraudulent voucher?

A Fraudulent.

Q You signed the name Albert Peterson?

A Yes sir.

Q Then you approved it, with your own signature, as actually rendered to the Government for services?

A Yes sir.

Q Now will you go through the list of vouchers I hand you, for the month of October, 1907, and state whether or not they correspond with the voucher number noted on the margin of the checks for that same month—You have checked over these vouchers for the various months covered by the fraudulent checks shown as Exhibit "A"?

A Yes sir.

Q These vouchers are the vouchers referred to on the margin of the checks?

A Yes sir, they are.

Q How often did you send these vouchers to the Department?

A Quarterly.

Q Every three months?

A Yes sir.

Q I now hand you another document, certificate for the month of October, 1907, is that your signature, M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q That refers, does it not, to the individual vouchers that you have just examined for that month?

A Yes sir.

Q That is a statement that you sent in as a part, or a summary of the quarterly account?

A Yes sir.

MR. McLAREN: I now offer in evidence, as plaintiff's exhibit "B" the vouchers just testified to by the witness as having been sent in by him, quarterly, to the Department at Washington, D. C., for the following months: October, 1907; November, 1907; December, 1907; May, 1908; June, 1908; July,

1908; August, 1908; September, 1908; October, 1908; November, 1908; December, 1908; January, 1909; March, 1909; April, 1909; May, 1909, and June, 1909.

MR. McCORD: I object to each of them as incompetent, irrelevant and immaterial and for the further reason that they show, in the light of the witness's testimony that they are all fraudulent.

Q Mr. McCoy, state whether, or not, it is true that these vouchers, just introduced in evidence, were in accordance with the usual and regular method of handing in vouchers that was in use between you and the Department at the time that they were sent in?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

MR. McLAREN: It may be stricken out by consent.

Q Is there anything in the—You say that, along about October, 1908, the Department changed this system of vouchers?

MR. McCORD: What do you mean by that?

MR. McLAREN: It just means that instead of the voucher plan, it was done by payrolls system.

MR. McCORD: What date was that made?

MR. McLAREN: October 8, 1908.

Q Examine these vouchers for October, 1908, and see if that was the new or the old system that was employed during that month, whether it is the individual voucher system, or the payroll system?

A That is the payroll system.

Q That is for sustenance?

A Yes sir.

Q You retained the individual voucher system for supplies and material?

A Yes sir.

Q How is it Mr. McCoy that no vouchers are found for the last two months' issue of fraudulent checks, that is the months of July and August, 1909—did you ever send in any vouchers for those two months?

A I sent no vouchers in because I was arrested before the quarterly account was sent in.

Q It is true, is it not, that the vouchers that you sent in for all of the other months were apparently regular and were in the usual form and manner?

A Yes sir.

MR. McCORD: Q. When were you arrested?

A September, 1909, about September 1st.

Q You say, Mr. McCoy, that you sent in statements to the Department quarterly, will you examine these—Referring, Mr. McCoy, to the voucher for October, 1908, and the other vouchers covered by the fraudulent period, whom did you say these vouchers were sent to?

A To the Commissioner of the General Land Office.

Q And were sent quarterly?

A Quarterly.

Q Now will you explain, Mr. McCoy, what these accounts are, which I hand you, and which are signed by M. P. McCoy special disbursement account?

A That is an account current for the quarter.

Q Covering the period from October 1st, 1907, to December 31st, 1907?

A Yes sir.

Q When you sent these quarterly account current in which you say you did quarterly, did you or did you not transmit with them the individual vouchers covering that same period?

A Yes sir.

Q Take the next one, from January 1st, 1908, to March 31st, 1908, is that your signature?

A Yes sir.

Q The same is true as to that?

A Yes sir.

Q The same is true as to all the vouchers down to a certain point?

A Yes sir.

Q Now calling your attention to the account current from July 1st, 1908, to September 30th, 1908?

A It is not true of that one. That is not the same thing I had in mind.

Q Take up the one, running from October 1st, to December 31st, 1908, and examine the leaflets on the inside, the outline of expenditures, the first item, October 31st is the payroll—That was the payroll system?

A Yes sir.

Q Now examine all of these quarterly accounts current, which I hand you, they are all signed by yourself, are they not as special disbursing agent?

A Yes sir.

Q These were sent in by you quarterly?

A Yes sir.

Q And, so far as their form is concerned, they were in due and proper form as was the customary practice of the Department?

A Yes sir.

Q Did these vouchers for expenditures, and also the payroll vouchers referred to in each of these accounts current include these fraudulent checks, Exhibit A?

A Yes sir.

MR. McLAREN: I now offer in evidence as plaintiff's exhibit "C," the quarterly accounts current, as follows: October 1st, 1907, to December 31st, 1907; January 1st, 1908, to March 31st, 1908; April 1st, to June 30th, 1908; July 1st, 1908, to September 30th, 1908; October 1st, 1908, to December 31st, 1908; January 1st, 1909, to March 31st, 1909; April 1st, 1909, to June 30th, 1909.

MR. McCORD: I object because they are incompetent, irrelevant and immaterial, and object to each of them as incompetent, irrelevant and immaterial.

Q Mr. McCoy, you sent in no quarterly account for the period after June 30th, did you?

A No sir.

Q The quarterly account was not yet due at the time you were arrested, is that the reason?

A Yes sir.

Q Is there anything on the face of these quarterly accounts, or upon the individual vouchers or payrolls vouchers that indicates any irregularity, or that indicates the practice, or I should say the fraudulent practice or scheme that you were carrying on?

MR. McCORD: I object to that as calling for the conclusion of the witness, that being the very thing that the jury is to pass upon and I object on the further ground that it is incompetent, irrelevant and immaterial.

Q State what that paper is?

A An account current.

Q For the period ending when?

A September 30th, 1907.

Q Beginning July 1st, 1907?

A Yes sir.

Q Any fraudulent items included in that account current?

A There were.

Q None of them covered by these checks—I will change the form of that question—Is that the usual form for the quarterly account that was in use?

A Yes sir.

Q Can you tell, from an examination of it, whether, or not any of these items were improperly allowed?

A Not from an examination of this alone, I would have to have the checks that correspond and then I could tell.

MR. McLAREN: I offer plaintiff's exhibit "D" a quarterly account.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial and not properly identified.

Q You are living in Spokane, Mr. McCoy?

A Yes sir, I am.

CROSS-EXAMINATION by Mr. McCord.

Q How long did you say that you occupied the position of examiner of surveys and special disbursing agent?

A I had the position of examiner of surveys for about nine years, and during four or five years of that time I was special disbursing agent.

Q Prior to the time that you became special disbursing agent, who attended to that duty of disbursing.

A I did the disbursing. I paid the expenses of the men and rendered my account to the General Land Office and was reimbursed by check from the Interior Department.

Q Who advised you in the first instance?

A The Department advised me in the first instance, of what was necessary.

Q You advanced your own money?

A Yes sir.

Q After that time you adopted the system—

MR. McLAREN: You don't mean that he adopted the system, the office adopted the system, of course.

Q After you became disbursing agent and also examiner of surveys, I will ask you where you maintained your office, if you had one?

A I had no office.

Q You attended to the surveys in Washington, Idaho and Montana?

A Yes sir.

Q Did the Government have any other agent, or assistant but you in the transaction of this business?

A No sir.

Q Did they have any other person, or individual or agent upon the ground to assist you in doing this work, or to check your accounts?

A Do you mean, now, assistants who I employed myself?

Q Employed by the Government?

A Well they were employed by me for the Government.

Q Who did you employ?

A My assistants in the field?

Q Yes sir.

A Well I supposed—I employed assistants to assist me in making the examination of the surveys.

Q Did the Government employ any other men to aid you?

A No sir.

Q In checking your accounts as special disbursing agent—Did the Government check your accounts?

A The Department have a special distributing agents—their usual custom.

Q They sent men to Seattle to examine them or do it at Washington?

A At the General Land Office at Washington.

Q Were they out here, at any time, by any body?

A Not that I am aware of.

Q How did they detect your fraudulent scheme?

A Mr. Good, I forget his initials, a special agent of the Land Office discovered it there in Montana.

Q You were not checked up in your field work, or in your agents work by any body until shortly before you were arrested during the whole period of time that you were in the service of the Government, is that right?

A That is right.

Q How many surveys did you attend to—about, in a general way, about how much money did you expend legitimately in the service of the Government between 1900 and 1909?

MR. McLAREN: I object as incompetent and irrelevant.

A I don't remember.

Q Give it to me approximately?

A Without looking up the records, I could not say.

Q In the year 1900, when you went to work for the Government in the capacity of examiner of surveys, until the time of your arrest in 1909, state approximately how much money you expended legitimately for the Government, how much per year would you estimate it?

MR. McLAREN: I make the same objection.

A Well I could not approximate it without looking over my—

Q Well about how much business were you doing—You can tell about how much you would do in a year—I am not trying to trap you into anything?

A If I could give you an approximate statement, I would gladly do so, but without going over the records, I don't see how I could do so.

Q As much as five thousand dollars?

A No sir.

Q One-half of that, twenty-five hundred dollars?

A No sir, nothing like that.

Q One thousand a year, would you say?

A The very outside limit would be one thousand dollars, I should say.

Q At any time, did the Government send any one else, so far as you know, to check up your work and see whether this money had been legitimately expended?

A No sir.

Q You have misunderstood the question, Mr. McCoy, have you not?

A It is only a surmise on my part, but I think there was a survey over in the extreme northeast part of Montana, over which several claimants were in litigation and I think possibly that it was reported that I had not been on the ground to make my examination.

Q What did this work consist of, examining of surveys?

Q The Government has public lands throughout these states and they make surveys of them.

Q This is done by United States Deputy Surveyors?

A Yes sir.

Q For the Government?

A Yes sir.

Q What did you do?

A Before the Government would accept it, I was sent into

the field to make an examination of the survey, whether it was in acceptable form, whether it was correctly done.

Q Did you go out and run the lines over and resurvey it?

A I was to approximately ten per cent of the lines run by the party.

Q As much as ten per cent?

A Yes sir.

Q You were supposed to hire assistants to do that?

A Yes sir.

Q Surveyors?

A Yes sir.

Q Now, Mr. McCoy, you have identified a bunch of checks here, plaintiff's exhibit "A," how do you know that these checks are the ones that you issued fraudulently—How can you tell?

A By recognizing my handwriting.

Q Every one is a different one, is it not?

A Yes sir.

Q And each individual check has a different signature—Do you mean to tell me that, from an examination of these checks that you can tell which ones you forged and which ones the signatures are legal?

MR. McLAREN: I object, the question assumes that there is a different payee for each check, which is not the case.

A I identify these from my own signature on the check.

Q When did you do that?

A At the time the check was issued.

Q When this list—When these checks were selected out, did you select them?

A No sir.

Q Who did?

A I couldn't tell you.

Q Did you go over the various checks that had been returned, with anybody in Washington and assist him in picking the forged checks, that is those that you forged?

A No sir.

Q You did not?

A No sir.

Q You have only made a cursory examination of these checks today, have you not?

A Yes sir.

Q You have not taken up each one individually and gone through them?

A Yes sir, each check.

Q Have you examined the signature on each one?

A Yes sir.

Q I would just like to have you tell me how you can remember five years after each one of these was taken which are genuine and which are not?

A Well I know that, during the time that these were issued, that I issued nothing but fraudulent checks.

Q Did you issue, at any time during the period from 1907 to 1909, anything but fraudulent checks—You don't mean that?

A None except those that were payable to myself.

Q From 1907 to 1909 you did nothing then—you did not issue a single check that was valid?

A Except those to myself.

Q Except the two hundred and seventy dollars a month?

A Yes sir my salary.

Q Everything else was fraudulent?

A Yes sir.

Q You did no work?

A I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q How much did you pay out in that way?

A I am unable to state.

Q About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A I don't think I could even approximate it.

Q Would you say that you had expended five thousand, one-third of that?

A No sir.

Q About four thousand dollars?

A About a couple of thousand dollars.

Q You have no way of arriving at that estimate?

A No sir, I have no records.

Q You think that you have spent about a couple of thousand, or it may be more?

A It may be more or it may be less.

Q It may have been as high as five thousand dollars?

A I don't think it was as high as five thousand.

Q As much as four thousand?

A I don't think it was as high as five thousand.

Q What were you doing—You say that you paid some men for services rendered, and that you paid it out of your own money—Do you know of any of the men that you paid it to?

A No sir, I do not.

Q Can't you recall any of them?

A No sir.

Q What work did they do for which you paid them?

A Some were chainmen and some were flagmen and some were teamsters and some of them were stage drivers and some of them livery stable people.

Q You did go over onto the different surveys, during the period from 1907 to 1909, to September, 1909, you did carry on the checking of these surveys?

A Only a part of them. I did a few of them.

Q You were on all of them, were you not, with the exception of the one in northern Montana?

A No sir.

Q How many all together?

A I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.

Q You made up reports on these various surveys and sent them in to the Government?

A Yes sir.

Q These reports showed that you had run the lines on at least ten per cent of the surveys, the deputy surveyor's work?

A Yes sir.

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

A No sir, on a few of them.

Q On others you did part of the work and certified that you did it all?

A Yes sir.

Q On all of them, with the exception of in northern Montana, you did some work?

A No sir.

Q What others?

A Well in quite a majority I did not examine in the field at all.

Q Didn't do any field work at all?

A No sir.

Q You had nobody do it?

A No sir.

Q You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A No sir, not a single man.

Q Not a single man?

A No sir.

Q Where did you keep this money, at Seattle?

A No sir, on the ground. That is, wherever I happened to be making examinations of surveys.

Q What sort of a report would you send in with the vouchers, would you draw a plat showing the survey?

A No sir, I would send in the field notes covering the ground.

Q You would send in the field notes you had gotten from the deputy surveyor's work?

A I didn't get them from the deputy surveyor, I got them from the Surveyor General's office.

Q You used the same notes in sending them in?

A Yes sir.

Q If you had done the work individually, they would not have checked with the work in the Surveyor General's office, would they—If you had made these surveys and run your own lines, it would not have checked correctly with the work in the Surveyor General's office, would it?

A No sir.

Q In checking, did you simply try to run over the lines made by the deputy surveyor on the ground and find his monuments?

A Yes sir.

Q And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A They were not copied, they were faked, we made our—

Q They were taken from the Surveyor General's office?

A The only data we had was taken from the Surveyor General's office.

Q They were reproductions of his notes?

A No sir.

Q You went to the Surveyor General's office and copied them?

A Yes sir.

Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well now then how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I would take my own field notes and my reports would be exact copies of my own field notes.

Q Wherever you found the monuments made by the surveyor, in those cases the notes would be identical, but in those notes that you faked from the notes in the Surveyor General's office—

A So far as the monuments and as to the topography they were not the same.

Q When you faked the notes you were not the same?

A It is seldom that any two men write up the same notes after going over a certain line.

Q Now then these checks that you draw, where did you cash them, Mr. McCoy?

A At different places around over the country.

Q Tell me how you would do it, take the first check for Albert Peterson, for twenty dollars—

A May I see the check, please.

(Exhibit "A" shown witness.)

Q The one on the top there, the back of the check shows—

A That I cashed it through the National Bank, or the Columbia Valley Bank of Wenatchee.

Q Did you take it in there yourself?

A No sir.

Q How did you arrange that?

A I sent these checks to this bank, under the name of J. D. King.

MR. McLAREN: You mean this particular check, you didn't send all of them? A This particular check.

Q J. D. King, who was he?

A A fictitious name, the same as the rest. I sent these checks to the Columbia Valley Bank in the name of J. D. King.

Q By mail?

A Yes sir.

Q From where?

A From the points, I don't remember now.

Q Did the bank send these checks—

A I opened up an account with the bank and sent these checks for collection.

Q You opened up an account in the first place?

A On this particular check as J. D. King.

Q Did you go there to open it?

A No sir, by mail. I sent these checks by mail in the first place.

Q You opened an account by mail?

A Yes sir.

Q Then you checked it out in the same name?

A Yes sir.

Q You forged the name of King to these checks?

A Yes sir.

Q How did you get the money—How did they send it to you?

A Then this was checked out in my favor by this man J. D. King, this fictitious King.

Q You cashed the checks in that way and sent to you by mail?

A Yes sir.

Q Were you ever in the Seattle National Bank?

A Yes sir.

Q Do you remember of any checks paid by them?

A Yes sir.

Q How did you manage that?

A Under the name of F. M. Clark.

Q Did you open an account under that name?

A Yes sir.

Q You went in personally?

A Yes sir.

Q You would go in there and deposit them yourself?

A Yes sir.

Q From time to time?

A Yes sir.

Q And then check them out?

A Yes sir.

Q How about the Mutual National Bank, how did you manage that?

A That was done by mail, under another name.

Q Where from?

A From some part of Montana, wherever I happened to be. I was at different points in Montana.

Q Would you send more than one check at a time?

A Yes sir. I would generally send the bunch for the month.

Q And have them placed to your account?

A Yes sir, to the account of these fictitious names.

Q King?

A Yes sir, or Clark.

Q Did you have more than one fictitious name?

A Yes sir, the first was J. D. King.

Q How many accounts did you have with the various banks—You had one under the name of J. D. King and one Clark, and what else?

A That is all.

Q And this was done under these two names?

A Yes sir, as I remember.

Q Then you would forge the name of King on the check and make it payable to your order?

A Yes sir.

Q You didn't go and draw the money yourself?

A No sir. It was sent by draft to me at Seattle and I would check it out from wherever I would happen to be.

Q When did you open the account with the National Bank of Commerce, or did you open it?

A The National Bank of Commerce, I opened an account there when they adopted this disbursing agent system.

Q Did you have the opening of the account yourself, or was it done from Washington?

A The deposit was made there from Washington, and I was notified of the fact.

Q The deposit was made from Washington?

A To my credit.

Q As M. P. McCoy, Special Disbursing Agent?

A Yes sir.

Q This was how the account was opened up?

A Yes sir.

Q You were directed to go there and leave your signature?

A Yes sir.

Q You went there and left your signature?

A Yes sir.

Q And you drew your money out of that account for various purposes connected with the Government?

A Yes sir.

Q Some that were legitimate, and some that were not, that is right, is it not?

A I checked that money out through other banks.

Q What—

A That is on checks cashed in other banks.

Q You drew checks?

A Yes sir and cashed the checks.

Q Every one of these checks contains your genuine signature?

A Yes sir.

Q And all of these in this bunch, to the best of your knowledge, are fictitious?

A Yes sir.

Q Is there anything on the face of these checks to advise or indicate the fact that there was anything fraudulent about them, was there?

MR. McLAREN: Which bank, the National Bank of Commerce?

A No sir, they are regular in every way.

Q The contents and endorsements are what the law required to be put upon them?

MR. McLAREN: I object as calling for a conclusion.

Q That is you have a pay-roll all proper for each draft forged?

A Yes sir.

Q That is on all of them?

A Yes sir.

Q Did you put the— I notice some of them have a voucher, number one voucher from the 6th to the 16th, you showed these vouchers to the bank, did you?

A No sir these vouchers were sent with my quarterly report to the land office at Washington.

Q You put in these all of the pay-rolls and sustenance and so on— I notice that some of them, or at least I thought some of them had no—did not have vouchers on them?

A The last ones, several of them are there not.

Q Some of these in April—in August, 1909, examine these for August, 1909, did you put notations of the purpose for which they were issued?

A No sir, it seems to have been left out.

Q Why was that?

A Well I don't remember why, an oversight on my part, I guess.

Q I will show you some in January, 1908—

A 1909 I suppose it is.

Q January, 1909, March, 1909, July, 1909, May, 1909, and June, 1909, examine these please—those do not seem to have any?

A These were after the adoption of the pay-roll system and the aggregate amount of these checks have been referred to in one voucher. The checks were referred to by number of the voucher rather than on the checks.

Q Did you exhibit your pay-rolls to the bank?

A No sir.

Q I see these checks, one bunch of them seems to have been paid direct, or part of these checks, take for instance the one for one hundred dollars, to J. D. King, the check is dated August 31, 1909, for one hundred dollars, number 13, and

August 31, 1909, for sixty-two dollars, in fact all of these for August, with the exception of one or two seem to have been drawn direct without the intervention of any other bank, were they not?

A No sir, these were paid through the Seattle National Bank and are stamped indistinctly on the back of them there.

Q They were paid through the Seattle National Bank?

A Yes sir.

Q Now you referred to your instructions a while ago, from the Government, they authorized you, when this deposit was put there to sign checks for this money in drawing it out, did it not?

A Yes sir.

Q You had authority from them to draw checks?

A Yes sir.

Q You showed that authority to the bank, I presume, you must have, did you not?

A Yes sir, I showed my letter of instructions to Mr. Maxwell, who was at that time cashier of the bank.

Q And these instructions that you got, you just exhibited them to him did you not?

A Yes sir.

Q You didn't give him any other instructions?

A No sir.

Q Just let him read your instructions?

A Yes sir.

Q The bank had no other instructions, except from reading your letter?

A I don't know, but I presume—

Q I don't want any of your presumptions— You don't know?

A I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A No sir.

Q There were no conditions, it had been remitted direct to the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A Yes sir, the purport of them.

Q That is the substance?

A I don't remember the wording exactly, but that is the substance or object of the letter.

Q To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

A Yes sir.

Q Now the bank, every month, rendered you a statement of your account, did it not?

A Yes sir.

Q And the vouchers, or the checks that you had used were not returned to you?

A No sir.

Q A list of them was returned to you in a statement of account?

A Yes sir.

Q Also the vouchers themselves and a statement were sent to the Department at Washington by the bank—That is the checks were sent to Washington?

A I don't know.

Q You don't know what the custom was?

A I presume they were but I had no means of knowing.

Q Your account was balanced up every month?

A Every quarter, yes sir.

Q Every month?

A No sir.

Q Was it every quarter?

A Every quarter.

Q The cancelled checks were sent to Washington—You understand that it is customary to send them to Washington?

A Yes sir, I do now.

Q These checks, so far as you know, were all sent to Washington at least every three months?

A Yes sir, I presume they were.

Q So that your account was balanced up every month between you and the bank?

A Yes sir.

Q The bank rendered you a statement every month?

A Yes sir.

Q They didn't wait until the end of the quarter, but rendered it every month to you?

A Yes sir.

Q They didn't render any to the Department at Washington?

A I don't know, I am sure.

Q Did the Government, prior to September, 1909, ever make any complaint or criticism of your acts or your dealings with the Government in regard to these examinations of surveys?

A No sir.

Q They never offered any criticism at all of any kind?

A Oh, once in a while there would be some item suspended for explanation, as for instance a telegram, a copy of which would have to be sent. Where I had failed to send a copy, or something like that, or some clerical error.

Q As I understand it, you sent in until October, 1908, you sent in to the Department at Washington vouchers for everything that you expended?

A Yes sir.

Q Purporting to be signed by the men who had done the work or furnished the supplies?

A Yes sir.

Q That is true, is it not?

A Yes sir.

Q These were sent in monthly, were they not?

A Prior to the adoption of the Special Disbursing Agent, yes sir.

Q After the adoption of the Special Disbursing Agent scheme, they were sent how often?

A Quarterly.

Q When was the disbursing agency feature adopted?

A I think after the first of October, 1908. That is when we began.

Q After the account was opened up in the bank in your name as Special Disbursing Agent and as Examiner of Surveys, from that time you sent in your vouchers quarterly?

A Yes sir.

Q And continued to do that until October, 1908, did you?

A I continued to do that until my arrest in 1909, September, 1909.

Q You sent in the vouchers, as well as the pay-rolls?

A No sir, sent in the pay-rolls after we adopted that plan.

Q October, 1908?

A Yes sir, prior to that time sent in vouchers.

Q You continued to send in pay-rolls quarterly after October, 1908?

A Yes sir.

Q So that throughout the whole history of these transactions, from the time you opened the account in the Bank of Commerce, until you were arrested, you sent in, every three months, vouchers for every dollar you claim to have expended?

A Yes sir.

Q These vouchers were used until October, 1908?

A Yes sir.

Q After October, 1908, the labor and services went in under the pay-roll?

A Yes sir.

Q You continued to have each member of the pay-roll sign that voucher?

A Yes sir.

Q They signed the pay-roll, each member that you claimed pay for services?

A They signed the pay-roll, yes sir.

Q Other services were on independent vouchers?

A Yes sir.

Q That was up to the time of your arrest?

A Yes sir.

Q The Government, at all times then, from 1907 up until the time of your arrest on September 1st, 1909, had these vouchers in its possession?

A Yes sir.

Q Now the Government could, very easily, by sending men out to check up the ground work and field work have ascertained that you had never been over it, could they not?

A Yes sir.

Q And that is the way that they finally stumbled onto the illegal practice?

A Yes sir.

Q Or it was an easy matter, was it not, to have found out from the people in the vicinity that you had not done this work, was it not Mr. McCoy?

A Except in the sparsely settled districts.

Q If they had made any investigation at all, or if they had enquired for any of these men you claim to have paid money to, they could have ascertained that the men could not have been produced?

A Yes sir.

Q So that by the simplest sort of an investigation they could have found out that there were no such people in existence as those whose names you had given?

A Yes sir.

Q Did they ever inquire from you, as to the men who composed these accounts, as to their residence or postoffice address of any of these individuals to whom you claim to have paid money?

A I think each voucher shows the postoffice address of each man who signed the voucher.

Q And all of these were fictitious and there was no such person at that place?

A No sir.

Q And a letter addressed to them would have been returned uncalled for?

A Yes sir.

Q I don't want to embarrass you, Mr. McCoy, but I want to ask you the question because I think it is necessary—When were you arrested and where?

A It was about the first of September, 1909.

Q Where were you arrested?

A At the Lincoln Hotel at Seattle.

Q With what offense were you charged?

A The offense of embezzlement of Government funds.

Q Of what particular embezzlement were you charged with?

A I don't remember.

MR. McLAREN: I will stipulate that he was indicted, arrested and sentenced for embezzlement covered by the checks shown in Exhibit "A."

Q Do you know what particular checks made up those you were arrested for embezzling on? What the particular funds were?

A I don't remember. I was rather embarrassed at the time the indictment was read to me, and I don't remember.

Q You were sentenced in Seattle?

A In Tacoma.

Q Were you tried?

A No sir.

Q You pleaded guilty to the indictment and you say that you don't know what was in it?

A No sir, I don't remember now.

Q You are now out on parol?

A No sir, I am at liberty, my parol expired on the 19th of last month.

Q So you are completely freed?

A Yes sir.

Q You are not pardoned?

A No sir.

Q So that your civil rights have not been restored?

A No sir.

Q Did you not make any application in person?

A No sir. I made an application for a parol and it was granted.

Q Mr. McCoy I will have to go into this a little more in detail, as I don't know how all of these different names here, that is the names of H. M. Benson, A. C. Jenkins, Charles Paine, George K. Cooper, E. M. Bassett, Joe Mikel, A. J. Whitney, F. W. McCulley, George D. Cook, F. M. Clark and J. D. King, all covering the month of August, 1909, I want you to tell me, if you can, how you can go through those and tell now, after the elapsing of five years, which ones of these signatures are fraudulent, and which are not, or that all of them are— I ask you whether you can do that from any independent examination of the signatures, as they now appear, or can you tell only because you were not doing any work during this period of time?

A I could not identify these from these fictitious signatures, but I can identify them from my own signature having issued the checks.

Q Well your signature does not appear on any of those checks—that is the signature of M. P. McCoy, except as the drawer of the check?

A That is all.

Q Can you independently say that all of these names placed on these checks and made by you, can you tell now from an examination of those signatures at this time— I don't see how it is possible— Tell me whether if you didn't have these passed up to you, and without any other information, whether you could tell whether these were forgeries?

A No sir, it would be impossible for me to tell.

Q If you saw the checks you could not tell that they were forgeries, except, as you say, between 1907 and 1909, you say that you did not issue any legitimate checks?

A Yes sir.

Q That is the only way you can tell?

A Yes sir.

Q That is also true of the vouchers, is it not, you could not tell that these were forgeries on the vouchers from an inspection of the vouchers at this time?

A Yes sir.

Q How?

A Simply by knowing that they were fraudulent.

Q I say by an examination of the voucher itself, independent of your personal knowledge, you could not tell, it would be an impossibility?

A No sir.

Q Now, Mr. McCoy, are you not mistaken in saying that, from 1907, the date of the first of these checks, October 14, 1907, to September 30, 1909, two years that you did not issue a single genuine check?

A Not as against the National Bank of Commerce.

Q How do you know that? You transacted business and had men in your employ, and were paying them from some source or other, now is it not possible that some of these checks that you drew were payable for a legitimate purpose and to the men who earned the money?

A No sir.

Q Why do you say that?

A Because whenever I incurred expenses in the field I paid it to the individuals themselves, and in order to carry this thing through I would issue checks against the National Bank of Commerce but only those that were fictitious.

Q What work were you doing from October, 1907, to September 30, 1909, what particular surveys were you examining?

A Surveys in the states of Washington, Idaho, and Montana. The records would show the title of each survey that is to whom contracts were let, but who they were now, I cannot recollect.

Q You are sure that you never drew any checks in their favor on the National Bank of Commerce?

A I am sure of that.

Q But you used the money that you got from the National Bank of Commerce in paying them?

A Yes sir, except those payable to myself.

Q The money that you got on these fraudulent checks you used, in part, to pay these men?

A Yes sir.

Q How much you have no means of knowing?

A No sir.

Q Otherwise that it is from one to four thousand dollars?

A Yes sir, somewhere within those sums.

Q But you did render services to the Government, valuable services, during that period, did you not in examining these surveys?

A Yes sir.

Q And employed men to assist you in getting the information you did furnish the Government?

A Yes sir.

Q And you did have men employed by you in examining surveys for the Government?

A Yes sir.

Q I would like to— If you can give me some more correct information as to the amount of money you spent on each particular survey, the number of men you would employ and I would like to have you try to recall, Mr. McCoy, about how much money you spent legitimately from 1907 to 1909, that you paid for out of funds that you carried in this bank?

MR. McLAREN: Q Is it your testimony, Mr. McCoy, that the actual services which you did pay for during this period, were paid out of these fraudulent checks, or did you put in a personal check to pay for these services? A I got this money individually.

Q Out of the proceeds of your personal checks?

A I paid them with my own money.

Q I want to get this clear— During the time that these fraudulent checks were sent in by you, you also sent in checks payable to yourself for different amounts, did you not?

A Yes sir.

Q Was it out of these checks, payable to yourself, that you paid the men that you had employed, or did you pay these men out of the proceeds of these fraudulent checks?

A I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and overtime and part of the money I got from the fraudulent checks.

Q You kept all of this money in the bank?

A Yes sir.

Q The National Bank of Commerce?

A Yes sir.

Q When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A Yes sir.

Q Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A Yes sir.

Q You could not tell which?

A No sir.

Q You have no doubt but that you paid out from one to four thousand dollars for the Government in this way?

A Yes sir.

Q Most of it came from the fraudulent checks, because there were more of them?

A Yes sir.

Q So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A Well the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q It was all mixed together?

A Yes sir.

Q The money which you did use to pay these legitimate expenses and labor was money paid out of your own personal bank account into which you had put the money realized from these fraudulent checks?

A Yes sir.

Q That is right, is it not?

A Yes sir.

Q Now take, for instance, the surveys for the year 1907, can you tell where you examined one—just recollect one where you did any work on it?

A Without having the records before me, I could not tell that.

Q It is possible, is it not, that you have paid out more than four thousand dollars?

A No sir, I should not estimate it any higher than that.

Q You think that four thousand is the maximum?

A Yes sir.

Q Would you consider that approximately the sum?

A I should say a couple of thousand. It might have been more or it might have been less.

Q It might have been as much as four thousand?

A It might have been over two thousand.

Q The last one of these vouchers was sent on September 30, 1907?

A No sir the last one went in—

Q June 30, 1909?

A Yes sir, June 30, 1909.

Q You didn't send in any after that?

A No sir.

Q But you drew quite a number of checks after that did you not?

A Yes sir, I drew checks at the end of July and to the end of August.

Q Did you keep any account in any other bank than the National Bank of Commerce as Special Disbursing Agent?

A No sir.

Q Did the Government not receipt to you for these various accounts that you sent in?

A No sir, it was not their practice, but they did, however, at the end of the year send me a statement from the auditor of the interior department of my account and including the account for the past year.

Q They verified your account at the end of 1907, did they?

A Yes sir.

Q And verified it at the end of 1908?

A Yes sir.

Q Tell you it was correct?

A Yes sir, letters were sent me from the Auditor of the Interior—from the Auditor of the Treasurer of the Interior Department and sent me these statements, at the end of these periods, stating that my account had been examined and found correct, or that there were some slight discrepancies and that they needed correction, or something of that kind.

Q What officer of the National Bank of Commerce did you do your business with, Mr. Maxwell?

A It was the young man who had charge of the disbursing of the Government funds in the rear of the office, I don't remember his name, in fact I never knew his name. He was one of the bank tellers.

Q Ever do business with Mr. Backus?

A No sir.

Q Did you ever do business with Mr. Stacey?

A No sir.

Q Did you ever do any business with Mr. Seewell?

A No sir.

Q Mr. Maxwell, you did show him your credentials?

A Yes sir.

Q Did you turn your signature over as Special Disbursing Agent?

A Yes sir.

Q And your written instructions were to show your orders to the bank, were they?

A I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q You were authorized to draw it out on your signature?

A Yes sir.

Q You showed that to the bank?

A Yes sir.

Q You didn't tell them anything about your being unlimited in your power to draw that money?

A No sir, I simply showed them my letter.

Q The letter didn't contain any limitation on your powers?

A No sir.

Q It was an unconditional authority.

A Yes sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q With that exception there was no limitation?

A No sir.

Q There was no limitation on the authority of the bank to pay you money?

A No sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q It didn't say anything about it at all?

A Well I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q You don't think that anything was stated as to any limitation at all?

A I don't think that there was any limitation stated.

Q When you say that you don't think that you could draw checks in favor of your own order, you are getting that from information other than that contained in the letter?

A Yes sir.

Q There was nothing in the contents of that letter that indicated that you could not draw it in your own favor?

A No sir, not that I can remember.

RE-DIRECT EXAMINATION by Mr. McLaren.

Q When were you paroled out Mr. McCoy?

A March 15th, last.

Q March 15, 1911?

A Yes sir.

Q You have been steadily employed in the City of Spokane for how long?

A Since June 15th.

Q For what firm?

A W. A. Richards, architects.

Q Since when?

A June 15, 1911.

Q You have never had any difficulty or trouble with the Government before this transaction of the fraudulent checks during all the time you worked?

A I never had any trouble with anybody, the Government, or anybody else.

Q Under your authority from the Government, you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?

MR. McCORD: I object as incompetent, irrelevant and immaterial and asking for an interpretation of a question of law by the witness.

MR. McLAREN: It is the same thing that you have gone into.

MR. McCORD: I didn't, I asked him about the contents of the letter.

Q When you told Mr. McCord that your letter of instructions, which you showed to the bank authorized you to draw checks against the funds without any condition, you didn't mean, did you that you were authorized by the Government, by that letter, to draw any checks, except in payment of bills?

MR. McCORD: I object to that as calling for a conclusion of the witness, seeking for an interpretation of the law upon the very question at issue here and the witness not qualified to answer it, and incompetent, irrelevant and immaterial.

Q Was that your understanding, Mr. McCoy?

A I hardly know how to answer that. I cannot say that I really understand the question.

Q You didn't mean, in answer to Mr. McCord's question to say that you were given authority to draw these checks, Exhibit A?

MR. McCORD: I object as it is calling for a conclusion of the witness and a legal opinion and asking for something that requires expert knowledge and that would require legal knowledge in the judge and jury and the very question at issue in this case.

MR. McLAREN: The question is withdrawn.

Q During the time covered by these checks, you were not doing much of any work—Were you doing anything in April, 1908, do you recollect being over at Great Falls, Montana?

A I don't remember anything specially.

Q I hand you four vouchers, numbered fifteen, sixteen, seventeen and eighteen, commencing April, 1908, to J. D. King, A. M. Anderson, F. M. Clark and Fred Evans, state whether these were fraudulent?

A Yes sir.

Q You received the money on these vouchers?

A Yes sir.

MR. McLAREN: I offer in evidence plaintiff's exhibit "E" (Vouchers Nos. 15, 16, 17, 18).

MR. McCORD: I object as incompetent, irrelevant and immaterial, not involved in this case as counsel has stated.

Q I hand you voucher for November, to yourself, for two hundred and seventy dollars— Can you state whether or not you worked during that month of November, 1907?

MR. McCORD: I object as immaterial.

A No sir.

Q I hand you voucher for December, 1907, Great Falls, Montana, two hundred and seventy-nine dollars, to yourself, do you remember whether you rendered any services in that month?

MR. McCORD: I object to it as immaterial.

A I don't remember.

Q Did you get the money on these two vouchers, payable to yourself?

A Yes sir.

MR. McLAREN: I offer in evidence Plaintiff's Exhibit F (Vouchers Nov. and Dec., 1907, favor of witness).

MR. McCORD: I object to them as incompetent, irrelevant and immaterial.

Q Now I hand you a certificate, signed by yourself, for the month of April, 1908, and I will ask you, if, on the first page of this, that is your signature "M. P. McCoy, Examiner of Surveys?"

A Yes sir.

Q Calling your attention to the item of disbursements, as shown by that itemized statement, and calling your further attention to page two, to a certain entry of expenditures, under date of April 8th. "To J. J. Carlton, Darby, Montana, for hire two horses and buggy, with driver, expenses, etc., eighteen dollars, is that part of a voucher that you returned under that heading?

A It is.

Q Calling your attention to the second portion, marked page three, under date of April 30th, 1908, "To J. D. King, Great Falls, Montana, for services as chainman, from April 19 to 30 inclusive, twelve days, twenty-four dollars," is that the same J. D. King the fictitious person?

A Yes sir.

Q To F. M. Clark, Great Falls, Montana, services as chainman, twelve days, two dollars, twenty-four dollars, is that the same fictitious person?

A Yes sir.

Q Fred Evans, Conrad, Montana, for board and lodging assistants, J. D. King and F. M. Clark, John Howard, E. M. Roper and A. M. Anderson, forty-five dollars and six cents, those are the same fictitious persons?

A Yes sir.

Q Calling your attention to page two of this itemized statement, April 21st, "To J. L. Murray, Helena, Montana, for board and lodging assistants J. D. King and F. M. Clark April 21, four dollars." Those are fictitious persons are they?

A Yes sir.

Q Ray Jones, Great Falls, Montana, for board and lodging assistants J. D. King and F. M. Clark April 22nd, three dollars," that is fictitious, is it not?

A Yes sir.

MR. McLAREN: Plaintiff offers exhibit "G" Certificate of M. P. McCoy, during the month of April, 1908, consisting of two separate parts.

MR. McCORD: I object, incompetent, irrelevant and immaterial.

Q You testified a while ago that during this period covered by the fraudulent checks, you were doing some work, is that true?

A Yes sir.

Q That is on different surveys?

A Yes sir.

Q You also testified that you had paid these men money, did you employ the cash which you received on your own checks?

A Yes sir, I paid them in cash.

Q You testified further that you thought that the cash might have been from the proceeds of these fraudulent checks?

A Possibly, I mean, that is all.

Q Is it not true, as shown by the statement in Exhibit "G," which I have just shown you, that you had also received other money which you were not entitled to and which you didn't earn which is not covered by these checks?

A Yes sir.

Q When you say that possibly some real services may have been paid out of these fraudulent checks, you don't know whether it is true or not?

A Yes sir, I know it was true.

Q How much was there of it?

A Well I am unable to tell how much.

Q How can you tell that it was not paid out of these fraudulent checks?

A I cannot tell that it was out of these fraudulent checks, but it was out of my money.

Q You cannot tell that it was not paid out of these fraudulent checks?

A No sir, I paid it out of money that I obtained whether it was from my salary, per diem or from these I cannot say.

Q Do you recall, Mr. McCoy, how the expenses covered by these vouchers, for April, 1908, were paid to these fictitious persons named in there—To refresh your recollection, I will call your attention to the month of April, 1908, as to the fraudulent checks in this case, do you recollect how they were paid?

A That was done prior to my appointment as Special Disbursing Agent.

Q In 1908, this is in April and the appointment was—

A I don't understand why this—During part of this year I was addressed as special agent of the General Land Office, and I acted as special agent under instructions from the commissioner of the General Land Office, and during that time I was examining applications for surveys for different people around there over the different states in which I traveled and during that time I was acting as special agent and not as disbursing agent, and this month covers both, where I was acting as special agent and also as examiner of surveys.

Q How about May, 1908?

A Yes sir.

Q How about March, 1908?

A Yes sir, the same way.

Q I will call your attention to the itemized report for March, 1908, that is your signature M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Disbursements as shown by within itemized statement and vouchers, one hundred and seventy-five dollars and twenty cents, that is the amount of the items set forth on the inside pages, is it not?

A Yes sir.

Q Is it not true, Mr. McCoy, that all of the actual services which you did incur, during the period covered by the fraudulent checks, were as a matter of fact itemized in your various reports, sent in and paid by the Government's money, either to you or to the persons whom you had hired by checks outside of these fraudulent checks which you have before you?

A Yes sir.

Q Then it could not be possible, if this is correct, that you paid for any of the actual services rendered out of the fraudulent checks, that would not be possible?

A It is possible in this way, that I had money obtained by fraud and also money obtained legitimately—

Q Is it not also true that all the money that you obtained legitimately would be paid through vouchers and checks other than these fraudulent ones?

A No sir.

Q Then why did you send in such a voucher as is shown on March, 1908, and also in April, 1908?

A That is when I was acting as special agent for the General Land Office.

Q Not disbursing any?

A I was not disbursing anything, but I was paying my railroad expenses and hotel bills.

Q During these two months is it not true that you put in accounts for King and Clark—

A That was during the latter part of the month, April, when I was acting as examiner of surveys.

Q I believe that you testified that you signed all of these vouchers and reports shown in Exhibit B, as M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Mr. McCoy in reference to your field notes, which you say were faked, during the time that you were not actually doing the work, as I understand your testimony in answer to Mr. McCord, you modified the field notes of the Surveyor General so as to give them the appearance of being genuine?

A Yes sir.

RE-CROSS-EXAMINATION by Mr. McCord.

Q You say that these vouchers which you refer to, Exhibit G, covering the months of March and April, 1908, that then you were acting as special agent for the land department?

A During part of the time.

Q And in that case you rendered an account of the work you did and received the money for it, did you?

A That is the way I remember it.

Q Well now then, how long did you act as special agent of the department approximately?

A Well during each spring, for a month or two.

Q So that in 1908 and 1909 you were also acting as special agent?

A Yes sir. No, excuse me, in 1909 I am under the impression that I did not act as special agent.

Q During this whole time you draw two hundred and seventy dollars a month, you were busy with government work all the time yourself?

A Yes sir.

Q Do you consider that you earned the two hundred and seventy dollars a month, yourself?

A No sir. I didn't when I was acting as special agent.

Q Part of the time you say you were—you had men employed doing legitimate work making surveys during the time that you were entitled to your salary?

A Yes sir.

Q On most of them covering this early period, you yourself were engaged, were you not, in tending to the work you were having done, you said that you had quite a considerable work

done in examining surveys and running lines and you were employed by the Government and you were receiving money from the Government at that time, were you not?

A Yes sir.

Q So that during most of your time you would consider that you were fairly entitled to the money that you drew, two hundred and seventy dollars per month?

A No sir, not during the last two years, I didn't consider that I did.

Q They paid you your salary?

A Yes sir.

Q They never objected to paying it at any time, they never raised any question about paying you?

A Yes sir, small ones.

Q They never sued you to recover it back?

A Not that I am aware of.

Q How long a time, Mr. McCoy, did you spend in the penitentiary at McNeil's Island?

A A year and a half.

Q How long were you sentenced for?

A Three years.

Q You were paroled after about a year and a half?

A Yes sir.

RE-DIRECT EXAMINATION by Mr. McLaren

Q You have just testified, Mr. McCoy, that you received your salary during all of that period and that the Government didn't protest the payment of your salary—I presume that you refer to your monthly vouchers which are shown in plaintiff's exhibit "B"?

A Yes sir.

Q And which you have certified as being correct?

A Yes sir.

Q On these vouchers is the alleged residence of the fictitious persons in each case, the place where they were supposed to have been living at that time?

A Yes sir.

Q You didn't do any work during the summer of 1909?

A No sir.

Q Did you ever do any work—

A Except early in the spring.

Q Can you tell approximately how many months pay you had rendered services for during the period covered by the vouchers you sent in—I don't mean exactly, but some where nearly?

A No sir, I could not tell you that.

Q Can you tell by consulting the names and addresses, Mr. McCoy?

A No sir, the only way I could tell it would be by having a list of the surveys, but I could not tell it from any information that I have here.

Q Could you tell from the Great Falls, Montana,—

A I was there mostly as special agent.

Q During the period covered by these checks, however?

A Yes sir.

Q There were no checks between January, 1908, and May, 1908, during the spring while you were examining these surveys and not disbursing any?

A No sir.

IT IS STIPULATED between the counsel, for both of the parties hereto, that they waive the reading of the testimony, after being transcribed, by the witness; and also the signing of the same by the witness, and hereby consent that the same may be transcribed by the reporter, from his shorthand notes taken, and, when so transcribed, may be certified by the Commissioner.

IT IS FURTHER STIPULATED that the said testimony, when transcribed, may be returned to the Clerk of the above entitled Court, with the certificate of the Notary or Commissioner, before whom the same was taken, that it is a full, true and correct transcript of the testimony of the witness, M. P.

McCoy, and that he was duly sworn before taking of the testimony.

The United States of America,
Eastern District of Washington,
State of Washington,
County of Spokane—ss.

I, Denton M. Crow, United States Commissioner in and for the Eastern District of Washington, do hereby certify that the above named witness, M. P. McCoy, was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that his deposition was reduced to writing by H. G. Twomey, a disinterested person, in the presence of the said witness; that the foregoing is a full, true and correct transcript of the testimony of the witness M. P. Coy and that the reading and signing of the deposition was waived by stipulation contained herein.

That said deposition was taken, pursuant to the annexed stipulation, at my office in the City of Spokane, Spokane County, Washington, beginning at 2 P. M. of February 19, 1912, and being completed on the same day;

That the parties were represented at the taking of said deposition by their respective counsel, as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition and that I am not counsel, or a relative of either party, nor otherwise interested in the event of this suit.

(Seal)

DENTON M. CROW,
United States Commissioner.

Dated February 23, 1912.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE.		
a Corporation,		
<i>Defendant.</i>	}	

STIPULATION FOR TAKING DEPOSITION.

IT IS HEREBY STIPULATED between the parties hereto, through their respective undersigned attorneys of record, that the deposition of M. P. McCoy, a witness for the plaintiff, residing at Spokane, State of Washington, may be taken upon an open deposition upon examination by the plaintiff's attorney and cross-examination of the defendant's attorneys by virtue of this stipulation and without commission or other authority or power by Denton M. Crow, United States Commissioner residing at said city of Spokane, on the 19th day of February, 1912, commencing at the hour of two o'clock P. M., or as soon thereafter as the same may be commenced, and the taking of said deposition may be adjourned from time to time to suit the convenience of said Commissioner and said witness, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate of said Commissioner shall be sufficient proof of his name and official character without other or further authority; all formalities being hereby expressly waived.

Said deposition when taken shall be mailed by the said Commissioner to the Clerk of the above entitled Court, at Seattle, King County, Washington, and may be read in evidence by

either party, subject to objection as to the competency, materiality, or relevancy of the testimony set forth therein.

Dated this 16th day of February, 1912.

ELMER E. TODD,
United States Attorney.

W. G. McLAREN,
Assistant United States Attorney.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: In the District Court of the United States for the Western District of Washington, Northern Division. The United States of America, Plaintiff, vs. National Bank of Commerce of Seattle, Defendant. Deposition of M. P. McCoy, a witness called by Plaintiff. Taken at Spokane, Washington, on February 19, 1912, before Denton M. Crow, United States Commissioner for the Eastern District of Washington, Eastern Division. Also exhibits A-G inclusive, filed with the said deposition. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 26, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
<i>Defendant.</i>		

BILL OF EXCEPTIONS.

For the purpose of making the foregoing matters a part of the record herein, I, Edward E. Cushman, Judge of the United

States District Court for the Western District of Washington, now on this 29th day of August, 1912, and within the term of this court during which the trial of the above entitled cause was held, do hereby certify that this cause was tried before the Honorable Cornelius H. Hanford, Judge of such court, with a jury, as aforesaid; that said Cornelius H. Hanford has since duly and regularly resigned said position as such Judge, which said resignation has been duly and regularly accepted, and that I am a Judge of the court in which the above entitled cause was tried, holding such court; that the evidence in said cause has been taken in stenographic notes, and that from said notes and from the admissions of counsel herein, I am satisfied that I am fully advised in the premises and can pass upon and allow a true bill of exceptions herein; and that the time for filing and serving said Bill of Exceptions having been enlarged and extended to and including the 31st day of August, 1912, by order of this Court and pursuant to stipulation between the respective parties hereto.

I further certify that on this day came on for settlement and certification the Bill of Exceptions in this cause, on the proposed Bill of Exceptions of plaintiff; counsel appearing for both parties, and the defendant by its attorneys, Kerr and McCord, agreeing that said proposed Bill of Exceptions and the deposition and exhibits therein set forth or referred to or hereto attached, be settled and certified as a true and correct Bill of Exceptions in said cause;

And I further certify that having duly settled and hereby settling and allowing the foregoing bill of exceptions in said above entitled action, do hereby certify the same, and do hereby certify that this Bill of Exceptions, together with the deposition of M. P. McCoy herewith, and the exhibits marked plaintiff's Exhibits "A", "G", "H", "J" and "K", and plaintiff's rejected Exhibits "B", "C", "D", "E" and "F", therein set forth, or referred to, or hereto attached contains all the evidence, exhibits and other material facts, matters and proceedings in said cause, not already a part of the record therein.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand with his title of office, at Seattle, in the Northern Division of the Western District of Washington, this 29th day of August, A. D. 1912.

EDWARD E. CUSHMAN,
District Judge of the United States for the Western
District of Washington.

Indorsed: Plaintiff's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	} Defendant.

ORDER TO TRANSMIT ORIGINAL EXHIBITS.

Now on this 18th day of September, 1912, upon motion of the United States Attorney, and for sufficient cause appearing, it is ordered that the plaintiff's original Exhibits "A" and "G" which were introduced in evidence on the trial of the above entitled cause and plaintiff's Exhibits "B", "C", "D", "E" and "F", which were offered in evidence on the trial of the above entitled cause, and rejected by the Court, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected

and considered together with the transcript of the record on appeal in this cause.

Dated at Tacoma as of the 29th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,	}	
<i>Defendant.</i>		

CERTIFICATE.

I, E. E. Cushman, Judge of the above entitled court, hereby certify that the accompanying documents are respectively plaintiff's Exhibits "A" and "G" which were introduced in evidence on the trial of the above entitled cause, and plaintiff's Exhibits "B", "C", "D", "E" and "F", which were offered in evidence on the trial of the above entitled cause, and rejected by the court, and are respectively the exhibits mentioned in the bill of exceptions herewith, and of which the said exhibits herewith form a part.

I further certify that the said original exhibits are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal of the above entitled cause for the reason that the alleged forgery of the instruments con-

stituting said plaintiff's Exhibit "A" is an issue herein, and an inspection of the said exhibit will be aidful to the said Circuit Court of Appeals, and for the further reason that said exhibits are difficult of reproduction.

Done in open court this 29th day of August, 1912.

EDWARD E. CUSHMAN,
United States District Judge, Western District
of Washington.

Indorsed: Certificate: Filed in the U. S. District Court, Western Dist. of Washington. Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,	}	
<i>Defendant.</i>		

ASSIGNMENT OF ERRORS.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

I.

The Court erred in overruling plaintiff's demurrer to the defendant's second affirmative defense.

II.

The Court erred in rejecting the evidence offered by the plaintiff upon said trial in the following instances, to-wit:

A. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance as to the arrangements had between said McCoy and the United States relative to the payment by said McCoy of the bills he might incur in the performance of his duties for the Government.

B. In excluding and rejecting plaintiff's Exhibit "B".

C. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that the vouchers sent in by said McCoy to the Department were regular and in the usual form and manner.

D. In excluding and rejecting plaintiff's Exhibit "C".

E. In rejecting and excluding portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not there was anything on the fact of the quarterly accounts or upon the individual vouchers or pay-rolls indicating any irregularity or fraudulent practice.

F. In rejecting and excluding plaintiff's Exhibit "D".

G. In permitting said M. P. McCoy to testify upon cross-examination regarding how much money he had expended legitimately for the Government between the year 1900 and the year 1909.

H. In permitting witness McCoy to testify upon cross-examination in substance that his letter of instructions from the Department advised the bank that he had authority to draw any money placed to his credit with the defendant bank as Special Disbursing Agent.

I. In permitting witness McCoy to testify upon cross-examination in substance that the letter of instructions to the defendant bank contained no limitation on the bank's authority to pay the witness money.

J. In permitting witness McCoy to testify upon cross-examination in substance that witness was authorized to draw any money placed to his credit in defendant bank on his own signature.

K. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that wit;

ness McCoy had no authority from the Government to pay money or draw checks against his account with defendant bank except in payment of legitimate bills.

L. In rejecting and excluding plaintiff's Exhibit "E".

M. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not witness McCoy had worked for the Government or performed any services during the month of November, 1907.

N. In rejecting and excluding plaintiff's Exhibit "F".

O. In rejecting and excluding plaintiff's Exhibit "J".

III.

The Court erred in granting defendant's motion for a non-suit of plaintiff's case at the conclusion of all of plaintiff's evidence after plaintiff's case had been re-opened.

IV.

The Court erred in entering the final judgment of non-suit against the plaintiff and dismissal of said action.

WHEREFORE, The plaintiff prays that the judgment of the District Court be reversed.

W. G. McLAREN,
United States Attorney.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation,		
<i>Defendant.</i>	}	

PETITION FOR WRIT OF ERROR.

The plaintiff above named, the United States of America, feeling itself aggrieved by the judgment of the Court, made and entered in this cause on the 27th day of June, 1912, herein, comes now by W. G. McLaren, United States Attorney for the Western District of Washington, and petitions this Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided.

W. G. McLAREN,
United States Attorney for the Western
District of Washington.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	}	No. 1933—C.
<i>Plaintiff,</i>		
vs.		
NATIONAL BANK OF COMMERCE,		
a Corporation.		
<i>Defendant.</i>	}	

ORDER ALLOWING WRIT OF ERROR

Upon the motion of W. G. McLaren, United States Attorney for the Western District of Washington, and upon the filing of petition for Writ of Error and an assignment of errors;

IT IS ORDERED, That a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

WITNESS THE SIGNATURE OF THE HONORABLE EDWARD E. CUSHMAN, Judge of the above entitled Court, at Seattle, Washington, this 29th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933—C.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	} Defendant.

PRAECIPE FOR RECORD.

To the Clerk of the Above Entitled Court:

You will please prepare at once transcript of the record in the above entitled cause on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and forward the same to the Clerk of that Court, including in the transcript the following papers necessary to the determination of the question to be passed on by said Circuit Court of Appeals:

1. Complaint filed December 22, 1910.
2. Answer filed February 11, 1911.
3. Plaintiff's demurrer to answer filed February 23, 1911.
4. Oral decision on demurrer to affirmative defense, filed September 21, 1911.
5. Order sustaining demurrer to first affirmative defense and overruling as to second, filed September 21, 1911.
6. Amended Answer, filed March 12, 1912.
7. Reply to amended answer, filed March 13, 1912.
8. Journal Entry March 13, 1912 (Journal 2, page 319-320) granting motion for non-suit.
9. Petition for new trial, filed March 22, 1912.
10. Order denying motion for new trial, filed June 27, 1912.
11. Judgment of non-suit, filed June 27, 1912.

12. Stipulation extending time for settlement of Bill of Exceptions, filed June 27, 1912.

13. Order extending time for settlement of Bill of Exceptions, filed June 27, 1912.

14. Stipulation extending time for settlement of Bill of Exceptions, filed July 17, 1912.

15. Order extending time for settlement of Bill of Exceptions, filed July 17, 1912.

16. Order extending time for settlement of Bill of Exceptions, filed August 24, 1912.

17. Stipulation authorizing filing of plaintiff's Exhibit "G", filed July 30, 1912.

18. Order authorizing Clerk to file plaintiff's Exhibit "G", filed July 30, 1912.

19. Motion to transmit exhibits with Bill of Exceptions, filed August 22, 1912.

20. Stipulation for transmission of original exhibits, filed August 22, 1912.

21. Order for transmission of original exhibits on writ of error, filed August 22, 1912.

22. Bill of Exceptions, filed August 29, 1912.

23. Certificate certifying Exhibits "A", "B", "C", "D", "E", "F" and "G", filed August 29, 1912.

24. Send plaintiff's Exhibits "A", "B", "C", "D", "E", "F" and "G" attached to certificate relating to them, filed August 29, 1912.

25. Assignment of Errors, filed August 29, 1912.

26. Petition for Writ of Error, filed August 29, 1912.

27. Order allowing Writ of Error, filed August 29, 1912.

28. Writ of Error, filed August 29, 1912.

29. Citation with Marshal's return, filed August 29, 1912.

30. Send original Writ of Error as well as include copy in transcript.

31. Send original Citation, as well as include copy in transcript.

32. This praecipe.

33. All indorsements of any kind whatsoever appearing on any of the above named papers.

B. W. COINER,
United States Attorney.

C. F. RIDDELL,
Assistant United States Attorney.

Indorsed: Praeipie for Record. Filed in the U. S. District Court, Western Dist. of Washington, September 13, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	} Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 212 printed pages, numbered from 1 to 212, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of the attorney for the plaintiff, save and excepting Government's Exhibits "A", "B", "C", "D", "E", "F" and "G", separately certified and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause, said exhibits being transmitted pursuant to the Order of the District Court made in the said cause August 29, 1912,

a copy of which order will be found on page 199 of said record, and that the same constitutes the record on appeal from the Order, Judgment and Decree of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in said cause.

I further certify that I hereunto attach and herewith transmit the original Citation and Writ of Error in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript of the record on appeal is the sum of \$244.20, chargeable to the United States, and that the said sum will be included in my account against the United States for Clerk's fees for the quarter ending December 31, 1912.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of October, 1912.

(Seal)

FRANK L. CROSBY, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit Court.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NATIONAL BANK OF COMMERCE,
a Corporation,
Defendant in Error.

No. 1933.

CITATION.

United States of America,
Ninth Judicial Circuit—ss.

To the National Bank of Commerce, a corporation, and Messrs. Kerr & McCord, its attorneys, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the 27th day of September, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the National Bank of Commerce, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 29th day of August, 1912, and in the one hundred and thirty-seventh year of the Independence of the United States of America.

(Seal)

EDWARD E. CUSHMAN,
United States District Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington—ss.

I hereby certify and return that I served the annexed CITATION on the therein named National Bank of Commerce, a corporation, by handing to and leaving a true and correct copy thereof with E. S. McCord, a member of the within named firm of Kerr & McCord, its attorneys, personally, at Seattle, in said District on the 30th day of August, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.
By H. V. R. ANDERSON, Deputy.

August 30, 1912.

Fees \$2.12.

Indorsed: No. 1933. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plain-

tiff in Error, vs. National Bank of Commerce, a corporation, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.
Northern Division.*

UNITED STATES OF AMERICA,	} No. 1933.
<i>Plaintiff,</i>	
vs.	
NATIONAL BANK OF COMMERCE,	
a Corporation,	}
<i>Defendant.</i>	

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit—ss.

THE PRESIDENT OF THE UNITED STATES:

To the Honorable Judge of the District Court of the United States for the Western District of Washington, GREETING:

Because of the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and the National Bank of Commerce, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States

Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 27th day of September, 1912, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereon to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 29th day of August, 1912, and in the one hundred and thirty-seventh year of the Independence of the United States.

Allowed by:
(Seal)

EDWARD E. CUSHMAN,
United States District Judge.

Attest:

A. W. ENGLE,
Clerk of the United States District Court,
Western District of Washington.
By F. A. SIMPKINS, Deputy.

Service of the within Writ of Error, and receipt of a copy thereof, is hereby admitted this 30th day of August, 1912.

KERR & McCORD,
Attorneys for Defendant—National Bank of Commerce,
a Corporation.

Indorsed: No. 1933—C. In the District Court of the United States for the Western District of Washington. United States of America, Plaintiff, vs. National Bank of Commerce, a corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NATIONAL BANK OF COMMERCE
OF SEATTLE, a corporation,
Defendant in Error.

No. 2190

Upon Writ of Error to the United States District
Court for the Western District of Washington
Northern Division.

Brief of Plaintiff In Error

STATEMENT OF THE CASE.

During the years 1907, 1908 and 1909 one M. P. McCoy was an examiner of surveys and special disbursing agent of the United States with head-

quarters at Seattle. McCoy's official duties required him to go into the field in various parts of the states of Washington, Oregon, Idaho and Montana and run over again one-tenth of the lines run by surveyors who made surveys of public land under contract with the government, in order to check up their work. (Record p. 58.) To pay for the expenses which he incurred, there were deposited with the defendant corporation, a national depository, various sums to the credit of M. P. McCoy as such special disbursing agent, which McCoy was to use solely for the purpose of making payment of the expenses incurred by him officially as aforesaid. He had his check book and drew various checks, signing them "M. P. McCoy, Examiner of Surveys and Sp. D. A." When he made a payment he was required to take the signature of the person he paid on a voucher and give him a check on said account in the defendant bank for that amount. (Record pp. 45-46.) McCoy sent in to the government each week a report covering his work for that week and every quarter submitted an expense account to which was attached the different vouchers covering the payments made by check on this government account (Record pp. 45-48). Every

three months the bank sent to Washington the cancelled checks covering the same time for which McCoy rendered his quarterly account (Record pp. 53, 70-71).

During part of the time in question the men he employed signed a monthly pay-roll when they received their checks for wages and the other payments for government expenses were evidenced by vouchers, in the manner before stated. This pay-roll was forwarded to the department like a voucher (Record pp. 46, 51-53).

McCoy went wrong and instead of doing the work on the surveys from 1907 to 1909 he falsified his reports to the government and executed fraudulent checks purporting to pay for work which was never performed (Record pp. 60-63). He forged vouchers for the amounts of the checks in the names of fictitious persons, issued the checks in the same names, forged the names of the fictitious payees to the endorsement of the checks, deposited the checks to the personal credit of the fictitious payee in some other bank (Record pp. 66, 67) which forwarded the same to the defendant bank. The defendant paid them. McCoy later checked

the money out of the account in the fictitious name, deposited the money in his personal account and used it(Record p. 47).

One W. G. Good, as special agent of the government, was finally sent out to investigate McCoy's work about September, 1909, and found that the services McCoy claimed to have rendered had never been performed; that the vouchers covering these checks in question were false and the person's name therein, fictitious (Record p. 97-100). At the time Good made his investigation, the fraudulent checks for the months of July and August, 1909, were still in the defendant bank and had not yet been sent to Washington (Record pp. 98-99). McCoy confessed, was indicted and plead guilty. Good, during the investigation, obtained from the bank the checks for the two months of July and August, 1909, notified the bank that they were all fraudulent, as he says, "gave them the history of the whole case," and returned the checks to the possession of the bank (Record pp. 118, 119).

On March 4, 1910, the United States Attorney for the Western District of Washington made a demand for the re-payment of the \$15,129.81 herein sued upon, attached to his demand a list of the

checks with their description and notified the defendant that its officers and attorneys would be allowed to inspect the checks (Record pp. 137, 147). The bank later sent an officer to inspect the checks and he did so (Record pp. 121, 122). The bank refused to repay the money and this action was instituted.

The defendant's answer set up two affirmative defenses, the second of which was to the effect that the deposit in this case was made in the usual and ordinary manner and it was not the duty of the defendant to inquire as to the name of the payee of McCoy's checks; that the checks bore his genuine signature and that the bank rendered monthly statements showing the amount of each check, both to the government and to McCoy, in conformity with the usual custom of bankers; that no complaint of the payment of such checks reached the bank until March 5, 1910; that it was the duty of the plaintiff to examine the account and to promptly notify the defendant of the alleged forgeries; that by reason of the failure to notify the defendant within a reasonable time, plaintiff was barred and estopped from starting this action (Record 14, 15). A demurrer to this affirmative defense was overruled

(Record p. 19) and defendant later in an amended answer repeated the same defense in an amplified form, adding that by reason of the failure to notify the bank of McCoy's fraud within a reasonable time the defendant had lost its right against the various banks through which the checks had been forwarded for payment and that therefore the government was estopped from bringing this action (Record 22,23). The Court at the close of the plaintiff's testimony granted a nonsuit, upon the theory that a tender to the bank of the fraudulent checks was a condition precedent to any cause of action (Record pp. 116-117, 122, 28).

SPECIFICATION OF ERROR.

I.

The Court erred in overruling plaintiff's demurrer to the defendant's second affirmative defense (Record pp. 13-19, 22-23).

II.

The Court erred in rejecting portions of the evidence of M. P. McCoy, given by deposition, in substance that his instructions were to pay the necessary expenses to carry out the examination of the different surveys (Record pp. 44, 151).

III.

The Court erred in excluding and rejecting plaintiff's Exhibit "B," being the fraudulent vouchers corresponding to certain checks herein sued upon (Record pp. 49-52, 155-156, 90-92).

IV.

The Court erred in rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that the vouchers sent in by said McCoy to the Department were regular and in the usual form and manner (Record pp. 51-52, 156-157).

V.

The Court erred in excluding and rejecting plaintiff's Exhibit "C," being certain quarterly accounts current covering the transactions evidenced by the checks here in suit (Record pp. 52-53, 157-158).

VI.

The Court erred in rejecting and excluding portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not there was anything on the face of the quar-

terly accounts or upon the individual vouchers or pay-rolls indicating any irregularity or fraudulent practice (Record pp. 54, 159).

VII.

The Court erred in rejecting and excluding plaintiff's Exhibit "D," being a quarterly account (Record pp. 55, 159).

VIII.

The Court erred in permitting the witness, M. P. McCoy, to testify upon cross-examination regarding how much money he had expended legitimately for the Government between the years 1900 and 1909 (Record pp. 57, 58).

IX.

The Court erred in permitting witness McCoy to testify upon cross-examination in substance that his letter of instructions from the Department advised the bank that he had authority to draw any money placed to his credit with the defendant bank as Special Disbursing Agent (Record pp 69, 70).

X.

The Court erred in permitting witness McCoy

to testify upon cross-examination in substance that the letter of instructions to the defendant bank contained no limitation on the bank's authority to pay the witness money (Record pp. 81, 82).

XI.

The Court erred in rejecting portions of the evidence of witness M. P. McCoy on re-direct examination, in substance that the witness had no authority from the Government to pay money or draw checks against the account in question with the defendant bank except in payment of legitimate bills (Record pp. 83, 186-187).

XII.

The Court erred in rejecting and excluding plaintiff's Exhibit "E" (Record pp. 84, 85).

XIII.

The Court erred in rejecting portions of the evidence of said McCoy, given by deposition, which evidence was in substance whether or not that witness had done any work for the Government or performed any services during the month of November, 1907 (Record pp. 85, 187).

XIV.

The Court erred in rejecting and excluding plaintiff's Exhibit "F" (Record p. 85).

XV.

The Court erred in rejecting and excluding plaintiff' Exhibit "J" (Record pp. 110-112, 124-137, 43-44).

XVI.

The Court erred in granting defendant's motion for a nonsuit of plaintiff's case at the conclusion of all of plaintiff's evidence after plaintiff's case had been re-opened.

XVII.

The Court erred in entering the final judgment of non-suit against the plaintiff and dismissal of said action.

ARGUMENT.

The various questions presented by this record resolve themselves easily into practically three different heads only.

A. The error in the granting of the non-suit and dismissal of the action (assignments XVI. and XVII.) will be practically conclusive of this case.

B. In the event of a reversal, assignment numbered I, the error in overruling demurrer to the affirmative defense will only be material on a new trial.

C. All the other assignments of error numbered II. to XV. inclusive, relate to the admission or rejection of evidence and are of minor importance.

A.

THE MOTION FOR NON-SUIT SHOULD NOT
HAVE BEEN GRANTED.

The following is an outline of the government's argument on this point:

The general theory upon which a recovery is had where money has been paid under a mistake of fact will be called to the attention of the court and then there will be noted so far as applicable to this case the various circumstances and principles under which a recovery might be denied,

First: That a tender to the bank of the cancelled checks was not necessary.

Second: The question of the possible influence of any negligence on the part of the government will be discussed in its various phases.

Third: It will be shown that the fact that these checks were made out to fictitious payees did not make them payable to bearer and is no defense, and there will be cited to the court, cases on all fours with the case at bar in which recovery was allowed, and one case in which a recovery was denied.

The general theory on which a recovery is had by a depositor from his bank when the latter has paid the depositor's check upon a forged endorsement, is that money paid or credited on a mutual mistake can be recovered. The contract relation between a depositor and a bank is such that the bank can be compelled to pay upon demand any written order of the depositor for money, but not otherwise, and that the bank may not charge against its depositor any check which has been paid by it where the bank obtains title to the paper over a forgery.

United States vs. National Exchange Bank of Providence, 214 U. S. 302, 53 L. Ed. 1006;

First National Bank vs. Whitman, 94 U. S. (4 Otto) 343, 24 L. Ed. 229;

Shipman vs. Bank, 126 N. Y. 318, 12 L. R. A. 791, 22 Am. State Reports, 821;

Harmon vs. Old Detroit National Bank

(Mich.) 116 N. W. 617, 17 L. R. A. N. S. 514;

Onondaga County Savings Bank vs. United States, (Circuit Court of Appeals, Second Circuit) 64 Fed. 703.

Unless therefore there is some fact or circumstance to take this case out of the general rule, the court was in error in granting the non-suit. For this reason the rest of the government's argument on this point resolves itself simply into a negation of the various objections and exceptions which might take the present case out of the general rule.

I.

The learned trial court granted the non-suit on the theory that a tender of the cancelled checks to the bank at the time of the demand on the bank for the payment of the money here in suit, was a condition precedent to recovery. The court was of opinion that a tender of the checks to the prior endorsing bank was a condition precedent to any right of action by this defendant against the bank which was the prior endorser of this paper (Record 116-117) and that therefore, a tender of the checks was necessary in order to enable this defendant

bank to recover from the other banks. The court's position however is absolutely untenable and the premise on which he bases his argument has twice been considered by the United States Supreme Court.

Leather Manufacturers' National Bank vs. Merchant's National Bank, 128 U. S. 26, 32 L. Ed. 342;

United States vs. National Exchange Bank, 214 U. S. 302, 53 L. Ed. 1006.

In the Leather Manufacturers' Bank Case, the point was squarely before the court and it was held that the payee bank might recover of the prior endorser without any demand whatever and that the statute of limitations began to run immediately upon the payment, the court saying at page 35 (p. 344):

"One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy vs. Bank of Cincinnati*, 85 U. S.

18 Wall. 604 (21: 947); *Gurney vs. Womersley*, 4 El. & Bl. 133; *Cabot Bank vs. Morton*, 4 Gray, 156; *Aldrich vs Jackson*, 5 R. I. 218; *White vs. Continental Nat. Bank*, 64 N. Y. 316.

Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the Statute of Limitations begins to run, immediately upon the payment."

This language is quoted with approval in the case of *United States vs. National Exchange Bank*, 214 U. S. 302, 316; 53 L. Ed. 1006, 1011.

In the prior case of *Cooke vs. United States*, 91 U. S. (1 Otto) 389, 23 L. Ed. 237, the United States sued J. Cooke and others for eighteen counterfeit one thousand dollar bonds of the United States for which the government had paid them cash. It appears from the argument of counsel for J. Cooke & Co., 23 L. Ed. 240 that:

"These notes in question were surrendered to the officer selected by the United States to receive

and pay for them, and on such surrender were mutilated by the cancellation or punching out of the signature on the face of the notes, and otherwise defaced. And the Government not only has not returned the notes, but by its own acts has rendered itself unable to return and restore these obligations to us.

It has deprived us of the right of making reclamation upon the parties upon whom the notes, if they pass through our hands, were received.

The rule is, that the party to whom forged or counterfeit obligations are passed, must notify the party from whom they were received, immediately, and must tender to him the instruments themselves.

In this case no notification was given to the defendants until three weeks after the notes were received, and the notes themselves had been defaced and mutilated."

The objection also appears in 91 U. S. 395. This is the precise point which counsel raises in case at bar and was passed upon by the United States Supreme Court in the Cooke case in the following language:

"There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit, the cancellation could do no harm; for they were

worthless before. If they were genuine, they had already been cancelled by the payment."

The court in the Leather Manufacturers' Bank Case recognized a distinction between a suit by a depositor against his bank and a suit by that bank against a prior endorser and stated that a demand was necessary in the former case, but that not even that formality was required in the latter.

The question as to whether or not the demand must be accompanied by a tender of the checks themselves has been squarely passed upon in the case of *United States vs. Onondaga County Savings Bank*, 39 Fed. 259, which was affirmed by the Circuit Court of Appeals, Second Circuit, in *Onondaga County Savings Bank vs. United States*, 64 Fed. 703, where the court say at page 705:

"The refusal of the defendant in error to return the drafts has in no way prejudiced the plaintiff in error, or deprived it of any remedy against those who defrauded it."

The ground on which the court allowed the non-suit was therefore untenable.

II.

As to negligence: it appears from the testimony

in this case that McCoy deposited these checks in other banks where he gave a false name and that defendant bank paid them, relying on the endorsements of the other banks. It does not appear that this defendant made any investigation whatever to determine the authenticity of the endorsements. It also appears that an examination of the cancelled checks and the bank's statement would not have revealed the irregularities of McCoy.

The bank itself having been negligent in failing to make any investigation to determine the authenticity of the endorsements, cannot urge negligence of the Government as a defense.

Leather Manufacturers' Bank vs. Morgan,
117 U. S. 96, 112, 29 L. Ed. 811;

New York Produce Exchange Bank vs. Houston, 169 Fed. 787-788;

First National Bank vs. Fourth National Bank, 56 Fed. 967, 971.

In the latter two cases the language of Mr. Justice Harlan in *Leather Manufacturers' Bank vs. Morgan* was cited to this very point:

“Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot

receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.”

Moreover, the negligence of the bank through which this paper was received is imputable to the defendant bank. In *Harmon vs. Old Detroit National Bank*, (Mich.) 116 N. W. 617, 17 L. R. A., N. S. 514, 519-520, the court say:

“In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colorado, where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse, Banks & Banking, Sec. 446b; *Ellis vs. Ohio Life Ins. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said:

‘Where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent

disregard of this duty, retain the money received upon a forged instrument.'

The negligence of the Denver bank is imputable to the defendant."

Were that not sufficient for the purposes of this case, the Government could urge on the court the principle that an examination by the depositor of his pass book and checks is all the law requires, and that where such examination, as in this case, would have disclosed no irregularities to the government, the record need not show whether such examination was or was not made.

Leather Manufacturers' Bank vs. Morgan, 117 U. S. 96, 117, 29 L. Ed. 811, 819, where the court say:

"From *Welsh vs. German-American Bank*, it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk or some one else had forged the payee's name in the indorsement."

Counsel attempted to put into this record facts indicating that the Government by some independent investigation could have determined whether or not McCoy was conducting his business for the Government in a regular manner, but such facts, even if established, cannot avail the defendant, for the depositor owes the bank no duty even to search for or discover forged endorsements on his bills or checks (*National City Bank vs. Third National Bank*, 177 Fed. 136, 140) nor to conduct an independent investigation in order to prevent the fraud of a dishonest agent (*National Bank of Commerce vs. Tacoma Mill Company*, 182 Fed. 1, 12-13).

The Government was not negligent in failing to discover these forgeries for the additional reason that the Government is not presumed, any more than any other depositor, to know the signatures of the payees of its checks.

United States vs. National Exchange Bank,
214 U. S. 302, 317, 53 L. Ed. 1006, 1012.

Leather Manufacturers' Bank vs. Morgan,
117 U. S. 96, 117; 29 L. Ed. 811, 819.

It appears also that the witness, Good, when conducting his investigation, gave immediate notice to the defendant bank of the forgery of the checks.

The court will notice that Good's investigation occurred about September, 1909; that he got the cancelled checks for two months from the defendant bank and after McCoy had plead guilty, he notified the defendant bank that the checks were fraudulent, "gave them the history of the whole case," and returned to the bank the checks they had given him, which the bank thereupon forwarded to the Government and claimed credit for them in their accounts. It appears therefore that notice was given by the Government through its agent when it first had knowledge of the transaction and that irrespective of any question of negligence as a defense in this case, the facts show that the Government, through its officers has in every respect exercised reasonable prudence. We know of no other possible phase of the question of negligence which could be urged as a defense to this case.

III.

These checks being made payable to fictitious payees were not, therefore, payable to bearer.

In a number of cases where the same question presented by this record, or a similar question, was under discussion, some stress was laid on the

argument that where an agent without the knowledge of the principal, procures the checks to be made to a fictitious payee, they are therefore payable to bearer, and that being payable to bearer, the bank has paid them according to their tenor and the signature of the payee is not a forgery. The Government believes this contention to be unsound and there is certainly a strong line of authorities against it.

The argument of plaintiff on this point is briefly as follows:

The Government admits that a check is payable to a fictitious payee whether the payee is an actual person or not if the maker of the paper intends that it shall never be paid to the payee named. It is, however, the intention of the maker which governs. The United States was the maker of these checks under the well recognized exception to the general rule that where a Government agent signs a contract with his own name, but in his official capacity on behalf of the Government and pursuant to the authority of the United States, he does not become a party to the contract, but the contract is that of the Government, and finally that his knowl-

edge and intention as an agent, cannot in this case be imputed to the Government for the reason that McCoy obtained his knowledge that these payees were fictitious while he was engaged in a scheme to defraud the Government. Upon this argument the Government concludes that the checks were not payable to a fictitious payee within the knowledge of the maker and therefore were not payable to bearer and McCoy's endorsement of them was forgery.

An additional argument on this phase of the case is found in the fact that the regulations of the Treasury Department, which have the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper by a disbursing agent in the name of a fictitious payee. The authority of every agent of the Government is a delegated authority and parties dealing with agents of the Government must at their peril determine the extent of the agent's authority. The rejected exhibits in this case, being the vouchers for payments, show the method adopted by the Government for the disbursements of this public money and would have shown the bank, had it inquired into the authority of the

agent, that it was the purpose and intention of the Government that no check should be made payable to a fictitious payee or to bearer, but that the signature of the payee must correspond with the signature on the voucher taken by the disbursing agent.

The Washington statute, being Section 3,400 of Rem. & Bal. Code (Laws 1899, page 342, Section 9) provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable."

That the payees on these checks were both fictitious and non-existing persons we think admits of no question. The Government contends, however, that it is the intention of the maker of the paper which governs and determines whether or not the instrument thereby becomes payable to bearer. The authorities indeed, are practically uniform to the effect that where the maker intends the paper to be paid to a real person, or does not know that the payee is a fictitious or non-existing person, the instrument does not thereby become payable to bearer.

The statute above quoted is declaratory of the

common law on this subject and the following decisions are therefore in point.

Harmon vs. Old Detroit National Bank,
(Mich.) 116 N. W. 617, 17 L. R. A., N. S.
514, 519 and cases cited;

Armstrong vs. National Bank, 46 Ohio State
512, 6 L. R. A. 625, 15 Am. State Reports
655, 22 N. E. 866;

Shipman vs. Bank, 126 N. Y. 318, 12 L. R. A.
791, 22 Am. State Rep. 821, 27 N. E. 371;

Chism vs. First National Bank, 96 Tenn.
649, 32 L. R. A. 778, 54 Am. St. Rep. 863,
36 S. W. 387.

Even in the case of *Snyder vs. Corn Exchange National Bank*, (Penn.) 70 Atlantic, 876, which is an authority against the government's recovery in this case, it is said at pages 878 and 879:

“The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the payee is a fictitious person.”

Although these checks were signed by McCoy “M. P. McCoy, Examiner of Surveys and Sp. D. A.” the Government was the maker of these checks, under the familiar exception to the general rule of agency that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and

not personal, even where they are signed by the agent personally.

Jones vs. LeTombe, 3 Dallas 383, 1 L. Ed. 647;

Armour vs. Roberts, 151 Fed. 846, 852;

Hodgson vs. Dexter, 1 Cranch 345, 2 L. Ed. 130;

Garland vs. Davis, 4 How. 131, 148; 11 L. Ed. 907;

29 Cyc. 1446-7.

In *Jones vs. Le Tombe*, *supra*, the consul general of the French Republic drew a bill of exchange and signed it "LeTombe, the Consul General." The defendant was held not personally liable on this contract on the ground that it had been made by him on account of the Government and that credit had been given to the Government as an official engagement.

In *Hodgson vs. Dexter*, *supra*, the defendant, then late Secretary of War, was sued for breach of a covenant in a certain lease in that the buildings on the premises had been destroyed by fire. In the body of the lease the covenantor was described as "Samuel Dexter, of the same place, Secretary of War," the covenant purported to run from "the

said Samuel Dexter, for himself, his heirs, executors, administrators and assigns," and the indenture was signed "Samuel Dexter, Seal." Of this indenture the Chief Justice says at pages 363-365 (L. Ed. 136-137):

"It appears, from the pleadings, that congress had passed a law authorizing and requiring the President to cause the public offices to be moved from Philadelphia to Washington; in pursuance of which law, instructions, by the President, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war office, and that for this purpose and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the government, are public and not personal.

They enure to the benefit of, and are obligatory on, the government; not the officer.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macbeath vs. Haldimand*, cited from 1 Term Reports; and this court considers

the principles laid down in that case as consonant to policy, justice and law.

The plaintiff has not controverted the general principle, but has insisted, that, in this case, the defendant has, by the terms of his contract, bound himself personally.

It is admitted that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department, for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government; or that he was unwilling to contract on the faith of government. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government.

The official character of the defendant is stated in the description of the parties. This, it has been said, might be occasioned by a willingness in the defendant to describe himself by the high and honorable office he then filled. This unquestionably, is possible, but is not the fair construction to be placed on this part of the contract, because it is not usual for gentlemen, in their private concerns, to exhibit themselves in their official character.

* * *

The court is unanimously and clearly of opinion,

that this contract was entered into entirely on behalf of government, by a person properly authorized to make it, and that its obligation is on the government only.

Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he must resort to have them satisfied.

Judgment affirmed with costs."

In *Garland vs. Davis, supra*, the former Clerk of the House of Representatives had placed with plaintiff a verbal order for the publication of a volume of the United States Laws. The Clerk died, his successor in office violated the contract and gave it to another person. The plaintiff sued in tort. The plea was *non assumpsit*. In remanding the case upon the technicality of pleading the court in referring to the merits say at pages 148-149 (L. Ed. 915):

"But that being a promise confessedly on the whole evidence made by the original defendant, or his predecessor, as a public agent, if now rendering final judgment, we should probably, in that view of the record (no tort having been put in issue or found by the verdict), be obliged to decide against the original plaintiff on the merits, because public agents are not usually liable on mere contracts or promises made in behalf of their principals."

The following cases are cited to the same effect but have not been examined by the Government:

Macbeath vs. Haldimand, 1 Term Rep. 172;
Unwin vs. Wolseley, 1 Term Rep. 674;
Myrtle vs. Beaver, 1 East, 135;
Rice vs. Shute, 1 East, 579;
Brown vs. Austin, 1 Mass. Rep. 208;
Freeman vs. Otis, 9 Mass. Rep. 272;
Sheffield vs. Watson, 3 Caines, 69;
Fox vs. Drake et al., 8 Cowen, 191; 2 Dall.,
 444;
Osborne vs. Kerr, 12 Wend., 179;
Story on Agency, secs. 302-308;
Lord Palmerston's Case, 3 Brod. & Bing.
 275.

The Government therefore is the maker of these checks and it is its intention which governs or the intention of its agent acting within the scope of his authority, but in this case McCoy was acting in fraud of the Government in violation of his authority and his knowledge that the payees were fictitious and his intention to defraud his principal cannot be imputed to it.

This court has squarely passed on that proposition in *National Bank of Commerce vs. Tacoma Mill Co.* (1910) 182 Fed. 1, 11:

“But, having used such reasonable and proper

precautions, he cannot be held liable for the deceitful and dishonest acts of his agent, for the simple and very potent reason *that the agent is not his agent for such purposes. As to them, the agent is acting* wholly without the scope of his authority. To many details of an extensive business, it is impossible for the owner or manager to give personal attention." (Italics ours.)

Other authorities to the same effect are numerous.

Central Coal & Coke Co. vs. Good, 120 Fed. 793, 798 and cases cited;

Mulroney vs. Royal Insurance Co., 163 Fed. 833, 835-6, and cases cited;

Lilly vs. Hamilton Bank, 178 Fed. 53, 56-58;

American Surety Co. vs. Pauly, 170 U. S. 133, 156-159, 42 L. Ed. 977, 986-987.

In the Lilly case the court say:

"It is a general rule of the law of agency that a principal is bound by the knowledge of his agent. In the case of *The Distilled Spirits*, 11 Wall. 367 (20 L. Ed. 167), Mr. Justice Bradley said that the rule 'is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty.' That the rule has certain exceptions was conceded by Justice Bradley. He said, for example, that when it would be unlawful for an agent to communicate his knowledge to his principal, as when it has been acquired confidentially as attorney for a former client in a prior transac-

tion, the reason of the rule ceases, and his principal ought not to be bound by the agent's secret and confidential information. That case did not call for any expression of opinion as to whether there is not also another exception, when the agent is engaged in committing an independent fraudulent act for his own benefit. On principle it seems it should be so. If the reason of the general rule is that the law presumes the agent has discharged his duty of communicating his knowledge to his principal, there seems to be no just ground for denying the second exception above suggested, for it cannot be fairly presumed that an agent will communicate to his principal a fraud intended for his own and not his principal's benefit. Another reason for the general rule has been stated, however, and that is that where one in transacting the business of his principal is committing a fraud for his own benefit he is not acting within the scope of his authority as his principal's agent, and therefore that his knowledge of the fraud is not imputable to his principal. Speaking of the general rule that the principal is held to know all that his agent knows in any transaction in which the agent acts for him, the Circuit Court of Appeals for the Sixth Circuit, in *Thomson-Houston Electric Co. vs. Capitol Electric Co.*, 65 Fed. 343, 12 C. C. A. 645, said:

‘This rule is said to be based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. Such presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of an attempt to deceive and defraud his principal. The truth is that, where an

agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.'

Such was also the view expressed by the Circuit Court of Appeals for the Eighth Circuit in *Bank of Overton vs. Thompson*, 118 Fed. 798, 56 C. C. A. 554. And in *Allen vs. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185, it was said:

'The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. * * * There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of the principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such fraud bears some analogy to a tort willfully committed by a servant for his own purpose, and not as a means

of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established.'

Speaking on the same subject in *American Surety Co. vs. Pauly*, 170 U. S. 133, 156-159, 42 L. Ed. 977, 986-987, Mr. Justice Harlan says:

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry vs. Allen*, 151 N. Y. 1, 10 (36 L. R. A. 658), the court recognized the general rule. But after observing that it rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was 'engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose.'

To the same effect are *Benedict vs. Arnoux*, 154 N. Y. 715, and *Kettlewell vs. Watson*, L. R. 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal 'may be repelled by showing that, whilst he was

acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character.'

In *Commercial Bank vs. Cunningham*, 24 Pick. 270, 276 (35 Am. Dec. 322), which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, 'especially as he was a party to all these contracts, whose interest might be opposed to that of the corporation.'

This principle is reaffirmed in *Innerarity vs. Merchants' National Bank*, 139 Mass. 332, 333 (52 Am. Rep. 710), in which the court said:

'While knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating.'

citing

Kennedy vs. Green, 3 Myl. & K. 699;

Cave vs. Cave, L. R. 15 Ch. Div. 639;

Re European Bank, L. R. 5 Ch. 358;

Re Marseilles Extension Railway & L. Co., L. R. 7 Ch. 161;

Atlantic National Bank vs. Harris, 118 Mass. 147;

Loring vs. Brodie, 134 Mass. 453.

In *Terrell vs. Branch Bank at Mobile*, 12 Ala., 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law notice to the other directors of the facts. The supreme court of Alabama said:

‘It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended—he was contracting with the bank through his associates in the directory—he was borrowing, not

lending, its money—though a member of the board and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan.’

In his treatise on Equity Jurisprudence, Pomeroy says:

‘It is now settled by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.’ Vol. 2, Sec. 675.

Further citation of authorities would seem to be unnecessary to support the proposition that if Collins gave the certificate that he might, with the aid of O’Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the circuit court of appeals (38 U. S. App. 279, 72 Fed. Rep. 483, 18 C. C. A. 656), correctly held that plaintiff’s right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier’s

honesty; and that when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them,

‘In pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers, and without express authority—the corporation being ignorant of the fraud—the officers are not, in thus consummating such theft, the agents of the corporation.’

In *Eccles & Co. vs. L. & N. R. Co.*, 198 Fed. 898, 900-905, a very recent case, it seems that one Bywater, an agent of the defendant, schemed with other persons to defraud his company and prospective shippers, through the execution and negotiation of fraudulent bills of lading. Persons who were defrauded by purchase of these fictitious bills of lading sued the company, claiming that Bywater in perpetrating the fraud was an agent of the company. The court, however, drew this clear distinction, that when an agent is performing a non-delegable duty or where his principal induces third parties to rely on his representations, then the principal will be bound by the acts of the agent committed in fraud of the principal, but that where an agent is not performing a non-delegable duty or where the principal

places him in such a position as to induce third parties to rely on his representations, the principal will be bound by his acts even when committed in fraud of the principal. The court's decision of this point will be found on pages 900-905 and the rule summed up at pages 904-5 in the following language:

“It seems quite apparent that the exception to the general rule is recognized both in the federal court and in the Alabama court. It does not apply in either forum to cases in which the principal is charged with the performance of a duty to the person injured, the performance of which he undertakes to delegate to an agent, who negligently or willfully fails to perform it. In such case liability upon the principal ensues, not upon the idea of notice, but because the duty the agent failed rightly to perform was the non-delegable duty of the principal, the nonobservance of which he could not excuse to third persons by saying that he had intrusted its performance to his own agent.

The case at bar is not of this class. If an inquiry had been made of Bywater by plaintiff as to the validity of the bills of lading involved in the suit before taking them, and Bywater, in response to such inquiry which it was the defendant's duty to have answered, with knowledge of their infirmity, had falsely represented them to be genuine or had fraudulently concealed their infirmity from the inquirers, the defendant, being under a duty to disclose such invalidity to the prospective holder, would have been liable for the failure of its agent, though

without knowledge of such infirmities except through him. This was the case of the warehouseman decided by Judge Shelby.

*Commercial Nat. Bank vs. Nacogdoches Com-
press & Warehouse Co.*, 133 Fed. 501, 66 C.
C. A. 375. .

On the contrary, in the case at bar no inquiry was made by the plaintiff of Bywater as to the validity of any of the bills of lading which are the basis of the suit. Neither Bywater nor the defendant is shown to have had any knowledge of their existence before they were negotiated to plaintiff, nor was any action required or taken by him or it with reference to them."

It will be seen therefore that McCoy's acts in the instant case in the execution and negotiation of the checks in question were not performed in the scope of his employment but in violation thereof and in fraud of his principal. His knowledge, and his acts and intentions are not imputable to this plaintiff and the checks therefore are not made payable to bearer.

Under the principle announced in the last quotation which we believe to be good law, the Government would be bound by McCoy's signature in executing this paper. The bank had a right to rely on it and if McCoy's signature on these checks were the prominate cause of the loss in this case the

Government could not recover. McCoy, however, was not the agent of the Government to receive payment or to make any representations as to the authenticity of the signature or identity of the payee. So that his knowledge is not imputable to the Government and does not make these checks payable to bearer and the Government is not bound by his fraudulent intention when he made the checks payable to fictitious persons. His endorsement of them was a forgery and the bank is liable.

The foregoing principle, namely, that the knowledge of the agent who is engaged in a fraud of the principal is not the knowledge of the principal is, we believe, by the great weight of authority and in reason applicable to the instant case.

Harmon vs. Old Detroit National Bank (Mich.), 116 N. W. 617, 17 L. R. A., N. S. 514;

Chism vs. First National Bank, 96 Tenn. 649, 32 L. R. A. 778, 54 Am. St. Rep. 863, 36 S. W. 387;

Shipman vs. Bank, 126 N. Y. 318, 12 L. R. A. 791, 22 Am. St. Rep. 821, 27 N. E. 371;

Armstrong vs. National Bank, 46 Ohio State 512, 6 L. R. A. 625, 15 Am. St. Rep. 655, 22 N. E. 866.

In the Harmon case the court found that the

plaintiff did not intend the check in question to be made to a fictitious person, but intended the payee to be real. Plaintiff was, however, imposed upon by the fraud of his clerk, who knew of the fictitious character of the payee.

In the Chism case the plaintiff was imposed upon by a third party who represented himself as the agent of a non-existing person and procured the plaintiff to deliver to him a check drawn in favor of this non-existing person. The third party thereupon forged the name of the fictitious payee to an endorsement of the check and procured its payment to himself.

In the Armstrong case the facts are practically identical with those in the Chism case. In none of these cases was the question raised that the knowledge of the agent was the knowledge of the principal. In the Harmon case, plaintiff's own clerk was engaged in defrauding him. In the Chism case and in the Armstrong case, plaintiff adopted as his agent to deliver the check to the supposed payee, the person who was defrauding him. In allowing a recovery in those three cases the court necessarily adopted the principle that the knowledge of the

agent is not the knowledge of the principal or it would have found for the defendant.

The facts in the Shipman case resemble in the main those in the Harmon case, and the question was squarely raised and decided by the court:

“The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged. Bedell, of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals.”

As sustaining the above quotation the court cite:

Frank vs. Chemical National Bank, 84 N. Y. 209;

Weisser vs. Denison, 10 N. Y. 68;

Welch vs. German-American Bank, 73 N. Y. 424;

Cave vs. Cave, L. R. 15, Ch. Div. 643, 644.

The case of *Snyder vs. Corn Exchange National Bank* (Penn.), 70 Atlantic 876, apparently following

the doctrine of *Phillips vs. Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, is authority to the contrary. The New York and Pennsylvania courts attempted to distinguish the doctrine of those cases from the Shipman case upon the ground that in the latter case the signature on the check was the manual act of the principal induced by the fraud of the guilty agent, while in the Snyder case and in the Phillips case the guilty agent had authority to execute the paper and did so on behalf of his principal. We fail to see, however, why the delegation of authority to execute the instrument should render the knowledge of the guilty agent imputable to the principal in one case when the fraud of the agent inducing the manual act on the principal does not have the same result.

There is another consideration, however, which precludes the application of the doctrine of the Phillips and Snyder cases to the decision of the case at bar, and that is the fact that M. P. McCoy was by law prohibited from making any check payable to bearer and this defendant is chargeable with knowledge of that fact.

The regulations of the Departments of Government made pursuant to law have the force of law and are judicially noticed by the court.

Caha vs. United States, 152 U. S. 211, 38 Ed. 415;

Cosmos Exploitation Co. vs. Gray Eagle Iron Co., 190 U. S. 301, 47 L. Ed. 1064.

Section 5153 U. S. R. S. provides:

“All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; * * * ”

This defendant is a national depositary, and as such received the deposit in question pursuant to the above section.

Pursuant to the same authority which has existed in practically the same form since its enactment as Section 45 of the Act of June 3, 1864, Secretary Shaw on April 16, 1903, by Department Circular No. 49, promulgated the following regulation, which is still in force:

“6. If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by departmental regulations, or if any reason exists for suspecting fraud,

the office or bank on which such check is drawn will refuse its payment.

The same authority on December 7, 1906, in Department Circular No. 102, quoted Sections 3600 and 5488 U. S. R. S. and promulgated the following regulations:

“Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to ‘order,’ with these exceptions:

(1) To make payments of amounts not exceeding \$20, (2) to make payments at a distance from a depository, and (3) to make payments of fixed salaries due at a certain period; in either of which cases any disbursing officer may draw his check in favor of himself, or ‘order,’ for such amount as may be necessary for such payment, but in the first and last named cases the check must be drawn not more than two days before the payments become due. Any disbursing officer or agent drawing checks on moneys deposited to his official credit, must state on the face or back of each check the object or purpose to which the avails are to be applied, except upon checks issued in payment of individual pensions, the special form of such checks indicating sufficiently the character of disbursement. If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.

Such statement may be made in brief form, but

must clearly indicate the object of the expenditure, as, for instance, 'pay,' 'pay roll,' or 'payment of troops,' adding the fort or station, 'purchase of subsistence,' or other supplies; 'on account of construction,' mentioning the fortification or other public work for which the payment is made; 'payments under \$20,' etc.

Any check drawn by a United States disbursing officer payable to himself, or 'order,' 'to make payments of amounts not exceeding twenty dollars each,' under the provisions of this circular must bear indorsed thereon the names of the persons to whom the amount drawn is to be paid, or be accompanied by a list, or schedule, made a part of the check, containing the same information."

Section 310 U. S. R. S. in part reads as follows:

"* * * And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years or more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee."

Section 3648 is in part:

"No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." * * *

Every person who dealt with or accepted a check

of McCoy was charged with the knowledge that as a Government agent his powers were delegated and therefore limited by law and was also chargeable with the knowledge of the statutes and the regulations promulgated pursuant thereto and which have been quoted above. Referring to Section 3648 the Supreme Court in *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169, 176, say:

“The transactions by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the Government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority of their acceptance, he must have learned at once that, if received by Russell, Majors or Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.”

Quoting further from the same case:

“Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one

familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. * * *

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The Government cannot be held to a more rigid rule, in this respect, than a private individual.

If A authorizes B. to buy horses for him, and to draw on him for the purchase money, B cannot buy land and bind A by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well defined and limited authority was given, to ruin the principal who had conferred it. So it would place the Government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a Department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit. No Government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper."

The following cases accept the authority of The Floyd Acceptances for the doctrine that all persons dealing with commercial paper of the Government

must at their peril ascertain the authority of the public agent to execute it:

Marsh vs. Fulton County, 10 Wall. 676, 683;

The Mayor vs. Ray, 19 Wall. 468, 478;

Merchant's Bank vs. Bergen County, 115 U. S. 384, 390-391;

Pine River Logging Co. vs. U. S., 186 U. S. 279, 291.

The questions arise, therefore, whether McCoy had authority to issue a check payable to a fictitious payee and if not, whether the bank either is chargeable with knowledge of that fact or whether it, in dealing with his paper, must at its peril ascertain whether the payee was a real or fictitious person.

We believe it admits of no question that McCoy lacked authority to issue a check payable to a fictitious payee. The provisions of Department Circular No. 102 of December 7, 1906, are to the effect that *any* check drawn by a disbursing agent *must* be in favor of the party, *by name*, to whom the payment is to be made and payable to "order," with certain exceptions. In the exceptional cases the agent is allowed to draw the check in favor of himself or "order." This language does not require construction. All it needs is enforcement and McCoy's

lack of authority is too plain to admit of question.

Under the decisions of *Caha vs. United States*, *supra*, and *Cosmos vs. Gray Eagle Iron Co.*, *supra*, the Department regulations have the force of law which everybody is presumed to know. The bank, therefore, is chargeable with notice of McCoy's lack of authority and under the doctrine laid down in *The Floyd Acceptances*, *supra*, not only this defendant bank, but every person dealing with McCoy's paper, is required at his peril to ascertain the agent's authority to execute the same. They were required to know as a matter of law, that if the name of the payee on McCoy's check was not the name of the real person who rendered the service or delivered the article for the use of the Government, it must be the name of McCoy. A requirement by the bank that the payee be identified and the authenticity of his signature established would have prevented the loss to the Government. Such precautions are no more and no less than the contract which the defendant bank and every other bank dealing with this paper engaged to perform. It is the violation of that duty which is the proximate cause of the loss in this case and the defendant is liable.

One other consideration may be urged on the court to prevent a recovery in this case and that is section 3363 of Rem. and Bal. Washington Code, being the Laws of 1907, page 31, Section 1, which provides that:

“No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within 60 days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged.”

The trial judge however, and we believe correctly, held that the state statute of limitations could not be effective as against the Government, in accordance with the rule laid down in *United States vs. Thompson*, 98 U. S. 486, 25 L. Ed. 194. In fact the Circuit Court of Appeals for the Second Circuit has allowed recovery by the Government in a case where the forgery of the payee's name was not discovered for two years. That fact was held to be no defense.

Onondaga County Savings Bank vs. United States, 64 Fed. 703.

We know of no further objections that could be made to the recovery by the Government in this

case and submit that the granting of the non-suit was error.

B.

THE COURT ERRED IN OVERRULING THE DEMURRER TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE IN THE ORIGINAL COMPLAINT (Record, pp. 13-14), THE SAME BEING PRACTICALLY THE FIRST AFFIRMATIVE DEFENSE IN THE AMENDED COMPLAINT (Record, pp. 22-23).

The foregoing discussion contains all that could be said on this question and the court is now sufficiently informed of the contention of the Government and we believe it appears from those principles that no fact set up in the alleged affirmative defense constitutes any bar to this action.

C.

ERRORS IN ADMISSION AND REJECTION OF EVIDENCE.

These errors group themselves under two heads,

First, Those in which the court permitted McCoy to testify to the contents of writings of which copies could be produced, and,

Second, The exclusion of McCoy's oral testimony and the exhibits relating to the method whereby the vouchers were prepared and showing the purposes for which the checks were drawn.

The error in permitting McCoy to testify to the contents of written instruments is one too plain to require the citation of authority.

The error in excluding McCoy's testimony and in rejecting the vouchers as exhibits depends not so much on principles of law as it does upon the materiality as a matter of fact of these exhibits to the plaintiff's case. The plaintiff submits that if this case shall be retried, this testimony should be presented to the jury. It is necessary to an understanding of the whole transaction. It places before the jury facts which the defendant bank could have had upon inquiry and with the knowledge of which they should therefore be charged. This line of evidence undoubtedly would have great weight with a jury in determining whether or not the manner in which the Government conducted its business was such that this defendant in failing to require an identification of the payee has caused the loss of the money sued for and should therefore respond in damages.

The judgment of the United States District Court in this cause should be reversed and the case remanded for a new trial.

Respectfully submitted,

B. W. COINER,
United States Attorney.

C. F. RIDDELL,
Assistant United States Attorney.

IN THE

United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff in Error

VS

NATIONAL BANK OF COM-
MERCE OF SEATTLE, a Cor-
poration,

Defendant in Error.

No. 2190

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

BRIEF OF DEFENDANT IN ERROR

STATEMENT

During the years 1907, 1908, and 1909, M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the United States. The National Bank of Commerce of Seattle was a

government depository. The United States deposited with the National Bank of Commerce large sums of money at various times during the years to the credit of "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." McCoy was directed by letter from the Treasury Department to leave his signature with the National Bank of Commerce, to draw checks upon that bank, and to sign the checks "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." This letter of instructions was shown by McCoy to the bank, and it contained no limitation upon his right to check against the account; his authority under said letter of instructions to draw the money upon his own order was unlimited. (Record, pp. 69, 81, 82.)

Between October, 1907, and August 31st, 1909, upon checks so drawn, the bank paid out \$15,129.-81, as stated in the complaint. The checks in question were drawn by McCoy to fictitious payees. He endorsed the name of the fictitious payee upon the check and caused the check so endorsed to be deposited in another bank and the proceeds placed to his account under another fictitious name. The names that he used in opening up accounts in other

banks were F. M. Clark and J. D. King. (Record, p. 65.)

McCoy made weekly reports to the government, and monthly and quarterly rendered vouchers for all of his expenditures. The bank every month rendered a statement to the government and to McCoy as to the condition of the account and quarterly returned to the government all the vouchers that it had paid upon McCoy's order. The government was thus advised monthly and quarterly by the bank of the status of the account and the government was given the names of the persons to whom the checks were drawn, and the reports of McCoy to the government, also made quarterly, gave in detail the expenditures and the purposes for which the expenditures were made.

The testimony shows that all of the payees were fictitious and that McCoy, the agent of the government, had systematically, during the entire time above mentioned, attempted to defraud the government and had been unfaithful to his trust. He was arrested in September, 1909, and convicted, served his sentence in the penitentiary and had been paroled, and his testimony is practically the

sole testimony upon which the government relies. The evidence shows that he had never been pardoned nor had his civil rights been restored to him.

During the period that the checks in question were drawn McCoy had honestly performed certain work for the government in the examination of surveys, and had expended honestly for the government from \$1000 to \$4000 (Record, pp. 61, 77, 79) and expenditures to this amount were paid from the money that McCoy fraudulently had in his possession. All of the checks drawn upon the defendant bank bore the genuine signature of McCoy, in whose name the deposit was made.

The government in its complaint insists that the money was paid out by the bank on these checks wrongfully and without authority and seeks to recover from the bank the money so paid out.

The government failed to make any investigation or inquiry as to the accounts of its agent from 1907, when the frauds commenced, until 1909; failed to ascertain, as it could easily have done, that McCoy was acting fraudulently and that he was not doing the work nor expending the money that he represented he had expended, when a slight

inquiry would have disclosed the fraud and prevented its continuance, and would have prevented the loss which has been sustained by some one through the negligence of the government and through the fraud of its agent.

The plaintiff not only failed to discover the forgeries or to notify the bank of any irregularities in the accounts, but failed to make a demand for the money until six months after the forgeries were discovered. The failure of the government to examine the returns made by the bank and to report errors in time was a cause of the successful practice or continuance of the frauds and was necessarily detrimental to the defendant. The injury could not have occurred had the government performed its duty and examined the returns and had verified their truthfulness.

The defendant in its answer pleaded the statute of the State of Washington which provides that when a bank renders a statement of account to a depositor such depositor must within sixty days notify the bank of any errors or forgeries, and if the depositor fails to so notify the bank within such time that no suit can be prosecuted. The demurrer to this defense was sustained.

The defendant also contended that the deposit was made by the government in the name of McCoy in the usual and customary manner as deposits are ordinarily and customarily made by an individual creditor was established; that it became the duty depositor and that the relation of debtor and of the defendant to pay the checks drawn by McCoy against said deposits and that such checks were paid from time to time as the same were presented and that the checks were, under the negotiable instrument act of the State of Washington, made payable to bearer. That statements of account were rendered monthly to McCoy and to the government and that the duty was imposed upon the government to examine such accounts within a reasonable time and to report any discrepancies; that the government failed to do this for an unreasonable length of time; failed to notify the bank of any forgeries, or any irregularities in the statements; that no complaint was made of any improper payment of the checks and that the failures of the plaintiff to promptly notify the defendant of the forgeries or fraud resulted in damage to the defendant in the amount of the checks and prevented it from protecting itself against future

forgeries or fraud, and that the plaintiff was estopped to recover from the bank on account of its negligence and dilatoriness in investigating the acts of its agent that caused the fraud and in promptly notifying the defendant thereof. Defendant also contended that a considerable part of the money that was so fraudulently drawn by McCoy was expended by him in the payment of legitimate claims against the government. (Record, pp. 12, 22, 23.)

After the testimony of the plaintiff had been introduced the defendant made its motion for a non-suit, which was granted by the Court, and the government has appealed from the action of the Court in granting the non-suit and dismissing the action.

ARGUMENT

While the plaintiff has assigned numerous errors, the principal error upon which it relies seems to be the action of the Court in granting the non-suit, so that as counsel for plaintiff have seen fit to base their argument for the most part upon the action of the Court in granting the non-suit, we shall follow in our argument the course adopted

by counsel for plaintiff; and a discussion of the action of the Court in granting a non-suit brings before this Court the entire record in the case.

FAILURE TO RETURN CHECKS.

One of the grounds stated by the Court in granting the motion for non-suit was that the government had failed, upon the discovery of the forgeries or frauds to return the checks to the defendant, and the Court said:

“As the matter rests in my mind now, it seems to me like a difficult point to get over in this case would be that the checks were not returned. The right to recourse against the banks through which these checks came to the defendant bank would, according to ordinary banking rules, depend upon the return of the endorsed paper, and the government is held to observe the business rules which obtain with business men in business transactions, and the government is not allowed to assert a right while committing a wrong. If it was wrong to withhold these checks, it is not right to make the defendant bank pay.” (Record, p. 113.)

And again, on page 115 of the Record, the Court said:

“The case of United States against National Exchange Bank, 214 U. S., 302, decides one point, and that is that the rule requiring prompt notice to be given of the invalidity of commercial paper is an exception to the general rule, the general rule

being that where money is paid by mutual mistake the mistake can be corrected and the matter adjusted according to the rights of the parties. Now the exception that is made in the law is where notice of a mistake is not promptly given and after a lapse of reasonable time, if no notice is given, the party who has made the mistake is protected against bringing up the matter to be readjusted.

Now the Supreme Court decided that the exception does not apply except in those matters where the party who should give the notice is in a position to have knowledge of the mistake. It does not apply as against the government when checks are paid on fraudulent indorsement of payees, because the government does not know the payees, does not know their signatures, is not in a position so as to have the information so as to give notice of a mistake of that kind; therefore the rule does not apply. The argument to be drawn from that is that, in accordance with other decisions of the Supreme Court of the United States, the government is bound by the business rules that apply to the handling of commercial paper. As said by Judge Miller, the government itself is as much interested, if not more interested, than anybody else, in the value of confidence in handling commercial paper, and for that reason it is as much bound as private individuals are to the reasonable rules of business that are prescribed and followed for the protection of people who repose confidence in handling commercial paper. The defendant was not obligated to pay any of these checks except on presentation at its banking house in Seattle by the payee, and upon being satisfied of his identity, but in accordance with commercial usages, it acted with reasonable business prudence in taking these checks, accompanied by an endorsement which guaranteed or

warranted the genuineness of the signature of the payee; I mean taking these checks from another bank; and having done so it is entitled to be treated fairly in the matter of protecting its rightful recourse against the prior endorsers. I think essential to that right was the return of the checks or a tender of them. If I am not greatly mistaken in my understanding of banking business and the rules of law, this defendant upon being informed that the payees named in these checks were fictitious persons, and the endorsements of their names on the checks were forgeries, and that the checks were in the custody of the United States District Attorney, and that permission would be given to inspect them and take copies therefrom, would not on receipt of that notice or that kind of information have any legal ground to go to another bank from which the check had been received with guarantee and say: 'Here, that guarantee of yours has caused me to lose money and I require you to pay back the money that I paid on this check;' I don't believe the defendant bank could go to another bank and make a demand of that kind on that kind of showing or that state of facts. It would have the right to take the check and throw it down on the counter and require the money to be returned to it. I will grant the motion for a non-suit."

The government not only failed to return the alleged forged paper to the defendant, but retained the same until the trial of this case and introduced the fraudulent checks as evidence therein. If the defendant had sought to maintain an action against the banks from whom it received these checks, we

fail to see how such action could have been successfully maintained without the introduction of the checks in evidence. The evidence of these checks would have been indispensable to the successful maintenance of an action against the banks that received the money from the defendant. It could not be shown on the trial of such case that the checks had been lost or destroyed, but it would have appeared that the checks were in existence in the hands of the government that refused to surrender them, and with the checks admitted to be in existence and in the hands of the government any such action against the other banks would necessarily have failed.

But whether or not the Lower Court was right in its view as to the necessity of the return of the checks would not affect the correctness of its action in granting the non-suit if such action was right and supported by other principles of law. But we think that the position of the Court was clearly right.

Any action that the defendant would bring against the other banks would be necessarily based upon the liability of the collecting banks upon their endorsement of the checks; the question of the

genuineness of the checks would be one of the pivotal questions in any such suit and we are utterly unable to determine how such action could be sustained without the production of the alleged forged paper. The endorsing bank would become liable upon its endorsement which guaranteed the genuineness of the paper. The proof of the endorsement and of the lack of genuineness of the paper could not be sustained, it seems to us, without the production of the paper which the government has withheld up to this time and still refuses to turn over to the defendant bank.

The general rule is that the party to whom forged or counterfeit obligations pass must notify the party from whom they were received immediately and must tender to him the instruments themselves, "and the party receiving such notes must examine them as soon as he has opportunity and return them immediately." If he does not, he is negligent, and negligence will defeat his action.

Cooke vs. U. S., 91 U. S., 395.

Gloucester Bank vs. Salem Bank, 17 Mass., 45.

“One who has received such counterfeit bills or notes in payment of his debt must return, or offer to return them in reasonable time or he will forfeit his rights to recover the amount of them from the payer.”

National Exchange Bank vs. United States,
151 Fed., 405.

In the case of the *United States Bank vs. Bank of Georgia*, 10 Wheat., 333, Mr. Justice Story said:

“If this doctrine be applicable to ordinary cases it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification ingrafted on the general doctrine that the notice and return must be within a reasonable time, and any neglect will absolve the payer from responsibility.”

The case cited by counsel of *United States vs. Onondaga Savings Bank*, 39 Fed., 259, is based upon the decision in the case of *United States vs. Central Bank*, 6 Fed., 134, but the Court in *National Ex-*

change Bank vs. United States, 151 Fed., 402, holds that the case of *Cooke vs. United States*, 91 U. S., 359, is authority for the contention that there must be an immediate notice of the discovery of the forgery and a return of the documents.

If the defendant in this case had brought an action against the Seattle National Bank, through which bank some of the checks were paid, what sort of an action would it have been? Would it have been one sounding in tort or one based upon contract? Manifestly it must be an action upon the contract of endorsement upon the check, and as there were numerous checks, possibly passing through numerous hands, it must be apparent that the production of the check must be made to the Seattle National Bank before the return of the money and no suit could be successfully maintained with these checks in existence and not produced at the trial. Had the action been one in tort, the statute of limitation would be three years. This suit was not commenced until December, 1910, more than three years after a large part of the checks had been paid by the National Bank of Commerce; so that if defendant, as suggested in the Onondaga case had a remedy apart from the

check the statute of limitation had already run before notice of the forgeries was given by the government to the National Bank of Commerce.

Counsel also cite the case of *Leather Manufacturers National Bank vs. Merchants' National Bank*, 128 U. S., 26, but that case does not touch upon the rule that it was the duty of the government to return the checks immediately upon the discovery of the forgeries.

FICTITIOUS PAYEES.

But it is immaterial whether the lower Court was correct in giving one reason for granting the motion for non-suit if his judgment can be sustained upon any ground. This Court will bear in mind that M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, was the party in whose name the deposit was made upon the books of the National Bank of Commerce. His signature was furnished to the National Bank of Commerce by the direction of the Secretary of the Treasury; the bank was notified that McCoy was the only person authorized to draw checks upon that account; he was clothed by the government with authority to issue checks upon this fund; the government ap-

pointed him as its agent to issue negotiable paper and to place the same in circulation. McCoy affixed his genuine signature to each of the checks in controversy; he made the checks payable to fictitious payees and endorsed the checks in the names of the payees and through the agency of other banks succeeded in getting the money into his own possession.

“A check is a bill of exchange drawn on a bank, payable on demand. Except as otherwise herein provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.”

2d Rem. & Bal. Code, Sec. 3575.

“A bill of exchange is payable to bearer: ‘When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.’”

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

“Where the drawer of a check intended to use the name of payee and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one within the negotiable instruments act of May 16, 1901, making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable.”

Snyder vs. Corn Exch. Nat'l Bank, 70 Atl., 876.

“As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person the holder may declare and recover upon it as a bill payable to bearer.”

Snyder vs. Corn Exch. Bank, supra.

In the case of *Phillips vs. Mercantile National Bank of New York* (140 N. Y., 556; 35 N. E., 982; 23 L. R. A., 584,) the Cashier of the National Bank of Sumpter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, where it had an account. He drew checks upon that bank making them payable to the order of existing persons, but without their knowledge, and then endorsed the checks in their names to a firm of stock^{holders}~~holders~~ in New York, who collected them from the Mercantile Bank. The Receiver of the Sumpter Bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the

endorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of existing persons, and were therefore to be regarded as having been made payable to bearer and intended for delivery to stockholders in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent—so far as the New York Bank was concerned—was said to have been the intent of his bank and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the Court in that case said:

“Whether endorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee’s name, but that act did not affect the title or rights of the defendant.”

In this case it cannot be successfully maintained that McCoy did not know at the time he drew the checks that they were made payable to fictitious persons. It is true that he intended to perpetrate a fraud, but the statute does not say that the drawer of the check shall have knowledge of the ficti-

tious or non-existing payee, but the fact must be known to the person making the check so payable. The statute does not limit the case to drawers of checks or makers of negotiable paper, but goes farther and applies not only to the maker but to the person who has the power to draw the instrument and to put it into circulation.

Counsel on page 23 of their brief contend that the United States was the maker of these checks. In a sense that is true; but the statute goes farther and makes the paper payable to bearer if the fact of the fictitious payee is known to the person making it so payable. But we do not agree with counsel that the drawer of the check, within the meaning of the rule as to fictitious payees, was the United States. We contend that the drawer of the checks was M. P. McCoy, Examiner of Surveys and Special Disbursing Agent. When the government placed the deposit in his name it parted with the title to the money so deposited, and it became the money of McCoy so far as the legal title was concerned and the relation of debtor and creditor was established between the bank and McCoy as the agent of the United States.

In the case of *United States vs. National Ex-*

change Bank, 45 Fed., 163, a party feloniously and by false identifications succeeded in procuring a check from the postmaster of Milwaukee; the check was made payable to the party entitled to receive the money, but it was delivered to a party not entitled to it, the postmaster acting in good faith in issuing the check and delivering it to such imposter. The bank paid the check and paid it to the identical person to whom the postmaster intended it to be paid. In that case the postmaster kept his account in the same way that McCoy kept his account with the National Bank of Commerce. He went with the imposter to the bank and identified him, and upon such identification the bank paid the check. Subsequently the government brought suit against the bank for the recovery of the money, and the Court held that the bank was not liable for the reason that the money was paid to the person to whom the postmaster intended it should be paid.

In this case the bank paid the money to the person that McCoy intended should receive it. McCoy put the paper into circulation and through his acts, representing the government, caused the money to be paid to the wrong person. The Court

held that the bank was not in fault and that the government was not necessarily in fault and therefore allowed the loss to fall where chance placed it, viz: upon the government.

The case of *Hermon vs. Old Detroit National Bank* (116 N. W., 617; 17 L. R. A., N. S., 514) cited by counsel, distinguishes the case of the *United States vs. National Exchange Bank*, 45 Fed., 163. In that case the Court says:

“In that case, the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee.”

And in the same case the Court says that the statute in question relating to fictitious payees applies only in cases where the drawer knowingly draws the check to the order of a fictitious payee. But in the *Harmon* case the Court recognized the distinction that we are endeavoring to present, *i. e.*, that McCoy and the postmaster occupy similar legal positions: both the agents of the government; both had the deposit placed in their names; and in the *Harmon* case the Court clearly recognized the

authority of the postmaster, who was only a special agent of the government, to draw the check and identify the payee, or to make the check payable to bearer, and that by doing so he relieved the bank of any liability for paying it to the wrong person. McCoy, in drawing the checks, was acting in the line of his duties and had the right to draw checks upon the deposit of the government to which he had the legal title, and there is no reason that occurs to us why a different rule should prevail in the case of the government from the rule that does prevail against private individuals. If the agent acts within the scope of his powers the government is necessarily bound by his acts. When the government enters into the business of dealing in negotiable paper it becomes bound by the laws regulating the issuance of negotiable paper to the same extent and in the same way that a private individual is bound. It is subject to the same rules and the same regulations that control private individuals. In its sovereign capacity it is free from suit without its consent and the statute of limitations and laches do not bind it; but when it becomes a party to a negotiable instrument it is bound exactly like other parties. The duty of giving notice of pro-

test, of making demand, and various other duties imposed by the law merchant have been held to apply to the United States.

In the case of *Cooke vs. United States* (91 U. S., 395,) the Court says:

“Laches is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the dominion of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange it must use the same diligence to charge the drawers and endorsers that is required of individuals, and if it fails in this its claim upon the parties is lost. Generally in respect to all the commercial business of the government, if an officer ~~is~~ specially charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its duties and must be charged with the consequences that follow such omissions in the commercial world.”

Would it be seriously contended that if a private corporation had deposited money in the de-

fendant bank to the credit of its agent, and authorized him to draw checks against the fund, that he would not have the authority to draw a check to a fictitious payee? As between himself and his principal he might not, but as between the bank and himself manifestly he would. The principal that clothes its agent with the authority to so use his power as to perpetrate fraud must bear the loss if fraud be perpetrated, rather than the innocent party; and if McCoy, at the time he issued the checks intended to have the payees fictitious persons, then it seems to us that the checks were made payable to bearer and the bank was under no responsibility whatever in the premises.

Upon page 46 of brief of counsel for plaintiff is cited *Caha vs. United States* (152 U. S., 211,) and the case of *Cosmos Company vs. Gray Eagle Iron Company*, (190 U. S., 301,) to the effect that the regulation of any department of the government has the force and effect of law.

The cases cited do not hold this, but hold that the regulations are a part of the public records of which the courts will take notice in the trial of cases and that proof of such regulations will not be required. We do not understand the decisions to

go to the extent of holding that these regulations are the same in effect as a statute of the United States.

But the formalities with which these checks were issued were known to the government and the checks were received by the government at stated intervals during the time it was doing business with the National Bank of Commerce and no protest or objection was ever made as to the particular requirements of the checks. If the checks did not comply with the regulations the government should have objected; not having objected we think it must follow that they were waived.

But the checks were drawn by McCoy, who testified that he presented a letter from the Treasury Department to the National Bank of Commerce authorizing the bank to honor his checks, without conditions or limitations, and if any regulations to the contrary were in force the special letter of McCoy would have modified those regulations. The government clothed McCoy with the power to draw this money without any limitations, and there was no proof offered that the bank ever received any regulations. But even if the regulations were received, that would not alter the status

of the parties. The regulations construed as a whole require that the checks should state the purpose for which they were drawn, but this was never insisted upon.

As Judge Hanford said in his opinion (Record, p. 111) :

“The obligation of this defendant was to receive, safely keep and disburse public money according to law and regulations. The bank was not required to exercise supervision over the disbursing officers or to insure the government against embezzlement or loss of funds by misappropriation or for expending money for improper purposes. The duty of the bank was to pay the checks that were properly drawn by an authorized person, a person authorized to draw them, and pay the money to the payees or to the order of the payees named in the check. The bank could not know and was not required to know whether the payments were proper payments. It had to know that the payments were made as authorized by the checks. I think you are loading this case up with unnecessary matter in endeavoring to prove that these payments were fraudulent to the extent of being drawn for services that were not rendered or supplies that were not furnished. The bank did not have to inquire about them and was not in a position to know. The bank was in a position to know that the payees who presented the checks or got the money or indorsed them were properly identified.”

Now if the payee was a fictitious person then it was the intention of McCoy, who drew the check, that the bearer should receive the money.

Counsel refer to the *Floyd Acceptances*, 7 Wall., 666. As we read that case it does not support the contention of counsel. In that case the Secretary of War accepted a bill of exchange, contrary to the laws of the United States and for the accommodation of the drawer, no power being vested in the Secretary of War to accept drafts for accommodation. The same case, however, recognizes the right of the Secretary of War, or other officer of the government, although there may not be a statute specially authorizing it, to issue bills of exchange in order to transfer money from one point in the United States to another, or elsewhere. The power to make such transfers is incident to the exercise of other constitutional provisions, and if the officer draws a bill of exchange within the scope of his powers it then partakes of all of the incidents of ordinary negotiable paper and the good faith of its issuance cannot be inquired into. In that case the court says:

“It is true that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness and good faith which attended its origin, or any of its subsequent transfers, but, in reference to the authority of the officer who makes

it, to bind the government, it is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department or officer having the matter in charge has the right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty and his right and authority to effect such an object is always open to inquiry, and if they be found wanting, or if they be forbidden by statute, then the draft or acceptance is not binding upon the government."

Floyd Acceptances, 7 Wall., 666.

In this case it cannot be questioned that McCoy was clothed by the government with the power to draw checks in the conduct of his business, and the Treasury Department furnished his signature to the defendant bank and directed the bank to honor his checks on the fund. He had the power to issue checks in the transaction of his business and in the ordinary way and his actions in drawing the checks

were recognized over a long period of years by the government itself.

RECIPROCAL DUTIES BETWEEN BANK AND DEPOSITOR.

But whether this court recognizes the authority of McCoy to draw bills of exchange or checks payable to fictitious payees or not, still the action of the lower court in granting a non-suit was clearly correct for other reasons. We have insisted that the money was deposited to McCoy's credit and that the relation of debtor and creditor existed between McCoy as agent and the bank and that McCoy had authority to check on it without limitations or conditions, as he said in his testimony. But for the sake of argument assume that the money deposited to McCoy's credit at all times belonged to the government. Then it must follow that the relation of debtor and creditor existed between the United States and the defendant bank. And, as was said in the case of *Cooke v. United States, supra*, when the government enters into commercial transactions it abandons its sovereignty and becomes bound by the ordinary

usages and customs of commercial business and becomes bound by the rules regulating and controlling reciprocal obligations existing between a bank and its depositors. Among these obligations is the duty of the bank to furnish periodical statements of the condition of the account to the depositor. This is partly for the protection of the depositor and partly for the protection of the bank.

“It has long been the usage of banks to give out passbooks to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand, often periodically and by request of the bank as well as upon the volition of the depositors, and are posted or statements returned with them along with the paid checks or vouchers, showing the condition of the depositor’s account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness or fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account, as it appears upon the books of his depository, is one of such manifest advantage that it entails a correlative duty upon

the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his passbook for correction, or by other convenient method. Otherwise his silence will be regarded as an admission that the entries as shown are correct."

National Bank of Commerce v. Tacoma Mill Company, 182 Fed., 6.

"The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook."

Leather Manufacturers' Bank v. Morgan,
117 U. S., 96.

In the *Tacoma Mill Company* case, *supra*, the entire subject of the correlative duties between bank and depositor is considered and the authorities reviewed, and the court says:

"It being the duty of the depositor to examine the statements of his bank when periodically balancing his passbook, it must follow that he is charged with knowledge of what those statements contain, whether he makes the examination in person or through an agent designated for the pur-

pose. Logically, also, he must know the state of his own accounts, if regularly and honestly kept. He is not bound to know what a dishonest clerk may have inserted therein, contrary to the fact and with a purpose of deceiving and defrauding him, but he would be bound to know what the legitimate facts or entries would disclose if followed to their natural sequence in the exercise of ordinary business care and alertness. That is to say, if legitimate entries and the manner of their entry in books of account or books of business memoranda would be suggestive of other facts, or would lead to further inquiry before an ordinarily prudent man, acting in business concerns, would be satisfied, then the principal must know what the inquiry would result in if the information at hand were followed to its natural conclusion."

The doctrine of the above mentioned case is in line with the principles of the leading decisions of the United States Supreme Court and other courts.

Now let us apply the foregoing principles of law to the facts in this case. McCoy was the agent of the government; he rendered to the government weekly, monthly and quarterly statements; sent to the government forged payrolls, forged vouchers and forged receipts for a period of more than two years. His duties were to examine in the field one-tenth of the actual surveys of various town-

ships of the public domain and he was required to and did send in to the government reports, maps, drawings, and field notes of his work. The slightest examination or inquiry on the part of the government would have immediately disclosed his fraudulent practices and would have prevented a continuation of them, and would have rendered it impossible for him to have succeeded in defrauding either the government or the bank. He was constantly in the city of Seattle and sent his reports to the government as to his field work and of his expenditures in doing the work from Seattle; he sent in reports covering his field work in Washington, Montana and Idaho, giving the names and post office addresses of the fictitious persons whom he claimed to have employed. With the vast army of secret service men employed by the government it would seem that it was the grossest carelessness on the part of the government not to have discovered, for considerably more than two years, that McCoy's maps and field notes were made up without his ever having gone upon the ground himself. An inquiry addressed to any of the local employes of the government in the land department, the treasury department, or the legal

department, would have enabled the government to discover that his whole course of conduct was saturated with fraud.

Moreover, the defendant bank paid the checks drawn by McCoy upon his bank account, made out in his handwriting and signed by his guaranteed signature; paid them, however, through other banks. His account with the bank was balanced each month and a statement of the same furnished to him, and a statement furnished to the Treasury Department. Every three months all of the vouchers drawn by him were forwarded by the bank to the government and were retained by the government, as well as the statements, without question or protest. The government was charged with the money that McCoy drew and acquiesced in his method of doing business. No protest was ever made by the government either as to the form in which the checks were drawn or the fact that in many instances they failed to state the purpose for which they were drawn; and it was at all times within the power of the government to have discovered, by the exercise of even ordinary diligence, his fraudulent practices.

Had the government exercised this ordinary

diligence promptly, then no damage would have resulted, except as to the earlier fraudulent acts. It was the duty of the government to exercise at least ordinary diligence in investigating the acts of its agent, and such investigation would unquestionably have led to the discovery of the fraud.

The government did not do this, and now seeks to compel the bank, that acted in good faith and with due diligence, to save it harmless against the loss brought about by its own negligence, and which could not have happened had it been diligent.

Moreover, the statutes of this state provide that in case of forged checks, notice must be given to the bank within sixty days after the return of the vouchers to the depositor, otherwise no suit can be brought for the recovery of money paid out on forgeries. The statute is as follows:

“No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within sixty days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged.”

2 Rem. & Bal. Code, 3363.

It is contended by plaintiff's counsel that this statute can have no application to the United States, citing cases that hold that state statutes of limitation have no application to the United States. This statute is not in the nature of a statute of limitations but is one that is simply a recognition of the common law doctrine that a depositor must promptly verify his statements of account or otherwise his right of action shall cease. It does not undertake to fix the time within which a suit may be brought and is not a statute of limitations but one that regulates the reciprocal duties between a depositor and his bank. It is a reasonable provision and is one that is enforced against individual depositors, and no reason appears to us why it should not apply to the government. When the government enters into the relation of depositor with a bank in any particular state the statute becomes a part of the contract between the depositor and the bank and is binding upon the depositor, whether that depositor be the government or an individual, to the same extent as though it had been written into the contract.

Judge Hanford in ruling upon the demurrer (Record, p. 17) clearly expressed the general rule of

law and while he held that the statute did not apply did hold that the rule of law expressed in the statute had substantially the same force without the statute. The following is his language:

“There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obliged to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. Therefore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender

of his checks that the bank has paid, according to the rule of honesty and fair dealing the depositor becomes bound to look at the returns and report any error promptly. The rule between individuals having mutual running accounts is that an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant, as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The court sustains the demurrer to the first affirmative defense and overrules it as to the second."

In the latter part of Judge Hanford's decision he says that where both parties have been negligent and a loss has occurred, the law will

not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. So it would seem that if both the government and the bank were acting in good faith and that the loss has resulted by their mutual mistakes or mutual neglect, then the loss shall remain where it has fallen.

Counsel seem to rely upon the case of *United State v. National Exchange Bank*, 214 U. S., 302, but the facts in that case are entirely different from those in this case. In that case the United States sought to recover payments made at the United States Sub-Treasury at Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. Upon receipt of pension vouchers regular in form and purporting to be executed by the pensioner named therein but which in fact were forged, the United States Pension Agent at Boston drew checks upon the Sub-Treasury at Boston, aggregating \$6,362.07 in favor of the pensioners named in the vouchers and transmitted said checks by mail direct to the address of each pensioner, as given in the vouchers. The checks, with the purported endorsements thereon of the payees,

were cashed by the Exchange Bank and immediately endorsed to a National Bank at Boston for collection. The checks were presented by the collecting bank at the Sub-Treasury of the United States at Boston. The collecting bank received payment for the same and accounted for the payment to the Exchange Bank.

In this case the court held the United States could recover and at the conclusion of the opinion the court said:

“Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged endorsement having been broken at the time the checks were cashed by the United States and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

“The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay.”

In this case the defendant paid these checks with fictitious endorsements, charged the amount

thereof to McCoy's account and promptly notified the government of such charge. The government received the accounts and vouchers and has presented them in this case. It was the duty of the government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. The evidence shows that during all the months between the discovery of the forgeries in September, 1909, and the demand upon the bank on March 5th, 1910, the Bank of Commerce had rendered monthly statements of its accounts to the various banks from whom it received the checks in question for collection. It might have recovered the money had the notice of the forgeries been promptly given. Its recourse against these forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its right of recourse against the forwarding banks.

In the case of *Exchange Bank v. United States*, 151 Fed., 407, it is said:

"None of the cases made any exception of the

kind claimed by the United States in the case at bar, namely, that the defending bank, in order to meet the demand of the United States, is bound to establish that it suffered detriment by the delay.

* * * Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

"Consequently, if this were a case of commercial paper proper as known in the law of merchants, and between individuals, it is established that unreasonable delay in giving notice after the discovery of the forgeries would have discharged the Exchange Bank, without regard, ordinarily, to any question whether it suffered damage thereby. This, of course, is an exceptional rule, applicable to distinctly commercial paper, because with regard to liability for money paid on a signature supposed to be genuine, but forged, or paid under any other mistake, in ordinary transactions it is admittedly necessary that damage should have ensued by reason of any alleged negligence in giving notice of the facts. In conclusion as to this topic, the rule as we understand it is in entire harmony with the fundamental principles of that por-

tion of the commercial law which relates to giving parties to commercial paper notices of defaults. They insist upon promptness, but ordinarily require no proof, pro or con, on the question whether damage resulted from delay."

When the government received the periodical statements from the defendant bank and made no objection or protest against the correctness of the same for a period of more than two years, the presumption arose that the government had acquiesced in these statements and the account as between the government and the bank became a stated account and in order to evade the effect of this condition the government by the testimony admits that by the exercise of the slightest investigation it could have discovered the forgeries and fraud and could have protected itself and the bank. It therefore admits its own negligence and yet seeks to have the stated account set aside and seeks to recover from the bank for a loss occasioned by its own negligence. It repudiates the acts of its own agent, ignores all of the equities in the case and the rights of the defendant bank and seeks to take advantage of its own wrong. It has continuously refused to surrender the vouchers so that the defendant bank might proceed against the other

banks to whom it paid the money on the checks; it has acted in utter disregard of the rights of the defendant and has thrown every obstacle in the way to prevent the bank from recouping its losses by proceedings against third parties. It admits that it could have discovered the frauds, but did not do so, and yet seeks to compel the bank, an innocent party, to pay the loss sustained by the government and acquiesced in for a period of more than three years. It clothed McCoy with the power to draw the checks upon the defendant and with full knowledge of the drawing of such checks and their payment by the bank, the government stood by and exerted its utmost efforts to prevent the bank from recovering the money from third parties and has rendered it impossible for the bank to successfully prosecute any action against third parties for the recovery of the sums in controversy, by withholding the checks. It has disregarded the universal rule requiring a party who receives forged instruments to immediately give notice of the forgeries upon their discovery, and to return the documents.

If ever a case existed where the rule of law requiring the loss to remain where it falls should

be enforced, this is such a case. Even though for the sake of argument it might be conceded that the bank should not have paid out the money without a more strict identification of the payees and was, therefore, guilty of some negligence, still the laches, and delays, and refusal to return the documents on the part of the government rendered the government guilty of contributory negligence and the action of the lower court in granting the non-suit was clearly justified by the record in the case and by the law. The action of the lower court in granting the motion for non-suit and in dismissing the action was correct and should be affirmed.

Respectfully submitted,

JAMES A. KERR,

EVAN S. McCORD,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE PACIFIC STATE BANK, a Corporation,
Appellant,

vs.

A. S. COATS, as Trustee in Bankruptcy of RAYMOND
BOX COMPANY, a Corporation, Bankrupt, et al.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Western Division.

No. 2193

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE PACIFIC STATE BANK, a Corporation,
Appellant,

vs.

A. S. COATS, as Trustee in Bankruptcy of RAYMOND
BOX COMPANY, a Corporation, Bankrupt, et al.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Western Division.

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Names and Addresses of Attorneys.

ELMER M. HAYDEN, Esquire, #408 Perkins Building, Tacoma, Washington,

MAURICE A. LANGHORNE, Esquire, #408 Perkins Building, Tacoma, Washington,

H. W. B. HEWEN, Esquire, Attorney at Law, South Bend, Washington,

Attorneys for the Pacific State Bank, Appellant.

CHARLES E. MILLER, Esquire, South Bend, Washington,

Attorney for A. S. Coates, Trustee in Bankruptcy of Raymond Box Co.

JOHN T. WELSH, Esquire, South Bend, Washington, and

MARTIN C. WELSH, Esquire, South Bend, Washington,

Attorneys for Pacific Transportation Co., and Others, Creditors of said Raymond Box Company, Bankrupt.

Stipulation [for Omission of Caption of All Papers].

It is hereby stipulated that the caption of all instruments, other than that first prepared, may be omitted in preparing the transcript on appeal herein, and said transcript of the instruments without the caption shall be with like effect as though they were

shown properly captioned in the Court and Cause.

Dated September 25th, 1912.

CHAS. E. MILLER,

Attorney for Trustee.

WELSH & WELSH,

Attorneys for Certain Creditors.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for Pacific State Bank.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 28, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [1*]

In the District Court of the United States, for the Western District of Washington, Western Division.

IN BANKRUPTCY.—No. 1054.

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Petition of the Pacific State Bank [for Order Authorizing Foreclosure Proceedings, etc.].

To the Hon. Judges of the Above-entitled Court, and to the Hon. WARREN A. WORDEN, Referee in Bankruptcy:

Comes now the Pacific State Bank, and respectfully petitions your Honors, and represents as follows, to wit:

I.

That at all of the times hereinafter mentioned your petitioner was and now is a corporation, organized

*Page-number appearing at foot of page of original certified Record.

and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee last due, and is entitled to wage suits and actions at law or equity in the courts of the United States and of the State of Washington.

II.

That at all the times hereinafter mentioned, the Raymond Box Company, the bankrupt herein, was, and now is a corporation, organized and existing under and by virtue of the laws of the State of Washington, and has its principal [2] place of business at Raymond, Pacific County, Washington, in the Western District of such State, which said last-named corporation was, on or about the —— day of ———, 1912, adjudged bankrupt by this Court.

III.

That heretofore, and on or about the 2d day of December, 1910, the petitioner loaned to the bankrupt the sum of Twenty-three Thousand Four Hundred (\$23,400) Dollars, and in consideration thereof the bankrupt made, executed and delivered to petitioner its certain promissory note of that date, in words, figures and letters following, to wit:

“\$23400 South Bend, Wash., December 2, 1910.

THREE MONTHS after date, without grace, for value received, I, we or either of us, as principals, promise to pay to the PACIFIC STATE BANK, or order, at their bank in South Bend, Washington, TWENTY THREE THOUSAND FOUR HUNDRED DOLLARS, in United States gold coin, with interest thereon in like gold coin at the rate of eight

per cent. per annum from date until paid. Interest payable at maturity quarterly, and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible at the option of the holder of this note.

If this note is not paid when due, we agree to pay all reasonable costs of collection, including attorney's fees which the court may adjudge or deem to be reasonable and proper, and also consent that judgment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker, or makers of this note, dissolution of partnership, retiring from or disposing of business, [3] death, or any loss by fire the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received, each and every person signing or endorsing this note, hereby waives presentment, demand protest and notice of non-payment thereof, binds himself as principal, not as security, and promises that if suit be brought to collect the same, or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisement laws of the state of Washington.

(Signed) RAYMOND BOX COMPANY,

By J. A. HEATH, Pres.

MILES H. LEACH, Sec."

[Corporate Seal]

IV.

That at the same time and place, to wit, South Bend, Washington, December 2, 1910, to secure the payment of said promissory note, the bankrupt made, executed, acknowledged and delivered to the petitioner its certain mortgage of that date, a copy of which is attached hereto, marked Exhibit "A," which exhibit your petitioner asks to be made a part hereof in all respects as though said mortgage was set out in full herein, which said mortgage was duly filed for record in the office of the auditor of Pacific County, Washington, being the county in which the property covered thereby is situated, on the 8th day of December, 1910, and was recorded on said date in Book 30 of mortgage records of said county at page 31, and said mortgage was also filed as a chattel mortgage in the office of the auditor of Pacific County, Washington, on the same date as chattel mortgage, file No. 604. [4]

V.

That said indebtedness has not been paid, nor has any part thereof been paid, excepting only as follows:

Dec. 19, 1910.....	\$ 400.00
Dec. 22, 1910.....	298.29
Dec. 28, 1910.....	350.00
Mar. 3, 1911.....	449.05
Nov. 29, 1911, interest to Oct. 1st,	
1911....	1038.11

and there is now due thereon the full sum of Twenty-two Thousand, Three Hundred Fifty-one and 71/100 (\$22,351.71) Dollars, with interest from October 1st, 1911, at eight per cent per annum.

VI.

That as appears by the terms of said mortgage, the property covered thereby consists of real and personal property, and constitutes a manufacturing plant for the manufacture of boxes; that there is a large amount of machinery and equipment installed in said plant, which machinery and equipment will fast deteriorate unless said plant is properly operated and maintained; that since the institution of the proceedings in bankruptcy herein, your petitioner has been informed and alleges the fact to be that said plant has for some months just prior to the institution of these proceedings been operated at a loss; that the box business requires considerable operating capital in the way of stock on hand for manufacture and manufactured stock, and accounts receivable, and without a large capital, in addition to the plant itself, it is impracticable to operate a business of that nature, except at a loss and except at serious handicap.

[5]

VII.

That the value of said property is not greater than the amount of the claim of your petitioner against said property; that unless said property is sold to satisfy your petitioner's claim, the value thereof will fast become less, and your petitioner will be unable to realize therefrom sufficient to pay its claim, and your petitioner further alleges that the interests of the bankrupt estate, and of this petitioner and of all the creditors of said bankrupt will be best subserved and protected if an immediate sale of all the property of the said bankrupt now in possession and under

the control of the trustee, or which may hereafter come under his control, be had; that the costs and expenses of keeping said property will be great, and will rapidly accumulate, and that unless immediate sale of all of said property be had, the same will be greatly reduced by reason of such expenses and of the upkeep of the same.

VIII.

That your petitioner further alleges that said claim is a first mortgage and prior lien upon said property and all of it, prior to the claims of any other persons whomsoever, excepting the taxes for 1911; and your petitioner further alleges that it has no other security for the moneys so due and owing to it by the said bankrupt, and that the insurance companies which have been heretofore carrying policies of insurance on the property mentioned and described in Exhibit "A" have, in part, cancelled the same, and refused longer to carry insurance on said described property.

Your petitioner further alleges in connection with the foregoing that the policies of [6] insurance covering said property provide that the fact of insolvency through bankruptcy proceedings, or the appointment of a receiver, shall be of itself a cancellation of said policies, and the termination of the liability of the insurance companies thereunder.

IX.

That your petitioner further states that it files this petition, for the purpose of having this Court speedily act upon the matters and things herein contained, to the end that said described property may be

sold before it deteriorates in value, and before a partial or a total loss will be sustained by your petitioner, and if a sale is ordered and made under this petition, your petitioner prays that the costs and expenses of administering the bankrupt's estate be not charged against the property upon which your petitioner has a lien for the moneys so advanced to said bankrupt by it.

WHEREFORE your petitioner prays that an order may be entered herein authorizing your petitioner to bring proceedings of foreclosure in such court as may have jurisdiction thereof, making such parties as your petitioner may be advised should be made parties thereto.

If the Court should be of the opinion that the matters hereinbefore referred to and set out should be determined in this court, then your petitioner prays that the amount of said claim may be forthwith determined herein; that upon such amount being determined, that such amount may be adjudged to be a first and prior lien on all the property described in said mortgage so hereinbefore referred to, to the exclusion of all liens, if any, [7] against the same, and that a reasonable attorney's fee to be fixed by this Court be adjudged to your petitioner, in accordance with the terms and condition of said note and mortgage, in addition to the amount due thereon as principal and interest, and that this Court may forthwith order a sale of said property in such manner and form as the Court may deem just, but that said sale shall be without delay, excepting only to give such notice as the law and practice of this Court

prescribes; that upon such sale, your petitioner may be adjudged to have, and may have the right to bid the amount so adjudged to be due it, and to turn in on its bid to the extent of such claim, its said note, or make credit upon said note for the amount of petitioner's bid at such sale, and that the Court may make such other and further orders in the premises as may be just and equitable.

PACIFIC STATE BANK,

By J. G. HEIM, President,
Petitioner.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Petitioner.

State of Washington,
County of Pierce,—ss.

J. G. Heim, being first duly sworn, deposes and says under oath, that he is President of the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the *said* is true, as he verily believes.

J. G. HEIM. [8]

Subscribed and sworn to before me this 18th day of March, 1912.

[Seal] E. M. HAYDEN,
Notary Public in and for Said County and State, Re-
siding at Tacoma.

Exhibit "A" [to Petition of Pacific State Bank].**[Mortgage, Dated December 2, 1910—Raymond Box Co. to Pacific State Bank.]**

THIS INDENTURE made this 2d day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part;

WITNESSETH: That the said party of the first part for and in consideration of the sum of \$23,400.00, lawful money of the United States, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the party of the second part, and to its successors and assigns, the following real and personal property, privileges and franchises, particularly described as follows, to wit:

Block B of the First Addition to Raymond, Pacific County, Washington, according to the plat thereof on record in the office of said county, together with all buildings and structures situated thereon.

Also a tract described as follows: Beginning at a point on bank of slough South 19° 06' East 67.2 feet distant from the Southwest corner of 7th Street and Heath Street, Avenue, of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North 74° 22' East 130.8 feet; thence South 89° 19' East 79.4 feet; [9] thence North 55° 57' East 56.1 feet; thence North 43°

54' East 61.5 feet; thence North $83^{\circ} 54'$ East 76.7 feet; thence South $60^{\circ} 17'$ East 99.7 feet; thence South $18^{\circ} 0'$ East 131.2 feet; thence South $62^{\circ} 22'$ East 58.4 feet; thence South $26^{\circ} 19'$ West 113.3 feet; thence North $50^{\circ} 32'$ West 104.3 feet; thence $17^{\circ} 55'$ West 117.6 feet; thence North $41^{\circ} 46'$ West 34 feet; thence North $82^{\circ} 12'$ West 34.5 feet; thence South $44^{\circ} 14'$ West 105.32 feet; thence South $88^{\circ} 27'$ West 123 feet; thence South $80^{\circ} 55'$ East 56.4 feet; thence South $49^{\circ} 44'$ West 22.3 feet; thence South $23^{\circ} 51'$ East 39.6 feet; thence North $19^{\circ} 06'$ West 122.8 feet to the place of beginning.

Also the grantor's right to use the channel or cut off slough.

Beginning at a point 141.1 feet South and 571.7 feet East of the Southwest corner of 7th Street and Heath Street Avenue; of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North $57^{\circ} 18'$ East 165.5 feet; thence North $51^{\circ} 37'$ East 69.4 feet; thence North $31^{\circ} 11'$ East 108.2 feet; thence North $22^{\circ} 15'$ East 70.9 feet; thence South $72^{\circ} 4'$ East 121.4 feet; thence South $26^{\circ} 51'$ West 82 feet across slough; thence North $60^{\circ} 16'$ West 62.9 feet to bank of meander slough; thence South $89^{\circ} 27'$ West 61.4 feet; thence South $29^{\circ} 45'$ West 83.9 feet; thence South $57^{\circ} 0'$ West 199.7 feet; thence South $60^{\circ} 10'$ West 144.7 feet; thence North $26^{\circ} 19'$ West 113.3 feet to place of beginning.

Also the following machinery situated in the mill in said Block B: 1 Atlas Boiler 18' x 72"—4 Flue; 1 Atlas Twin Engine: Cylinder 11" x 16"; 1 Union

Machine Co. Drag Saw, Machine 48 stroke; 1 Log Jack; 1 Log carriage and feed works for same; 1 canting gear; 1 Crane for lifting blocks; [10] 1 Power bolter; with 70" inserted tooth saw; 1 Large Columbia Box Board Machine 52" saw; 1 Wood's Double Surfacers; 1 Frank Machinery Co. Pony Planer; 3 rip-saw tables; two with adjustable saws and automatic feed; 1 double automatic feed cut-off saw; 1 Hall & Brown 36" Circular Resaw; 1 Swing Cut-off with feet lever, friction feed; 1 Box Board Printer; 1 outfit for filing and grinding circular and band-saws, including *to* grinding machines; two tying machines, Lamb Manufacture; 1 Planer knife, grinder; 1 complete dust collection system. All conveyers; all piping for dry kiln; 40 dry kiln trucks; 1 transfer truck; all railroad tracks; 1 Berlin Band Resaw machine, including saws; 1 Morgan tongue and Groove Box Board matcher; all belts, shafting, and Transmission machinery, together with all fixtures and implements, real or personal property used in the operation of the plant of the Raymond Box Company, at Raymond, Washington, on said Block B and slough adjoining thereto. Also contract for water privileges of mill with Raymond Water Co.

Also the safe, desk, tables, stove, letter-press and all office furniture of the first part, situated on said premises, together with all and singular the tenements, hereditaments, appurtenances and privileges thereunto belonging.

It is also agreed that the first party shall keep the building and machinery insured in such standard fire insurance company as the party of the second

part may designate during the life of this mortgage in the sum of not less than \$11,000.00, with loss, if any, payable to the mortgagor, as its interest may appear.

In the event that the mortgagor fails to procure said insurance and deliver the policy therefor to the second party, [11] the second party shall have the right to take out said insurance, and the premium cost thereof shall be deemed secured by this mortgage and included therein.

This agreement is intended as a mortgage to secure the payment of \$23,400.00, lawful money of the United States, together with interest thereon at the rate of 8 per cent per annum, payable at maturity, at the banking-house of the second party in South Bend, Washington, and according to the terms and conditions of one (payable in three months) promissory note, bearing even date herewith, made by the Raymond Box Co., and payable to the order of the Pacific State Bank; and these presents shall be void if such payments be made according to the terms and conditions thereof, but in case default is made in the payment of principal or interest of said promissory note, or any portion thereof as the same may become due and payable according to the terms and conditions thereof, or for breach of any of the covenants of this mortgage, then the party of the second part, its successors and assigns, are hereby empowered to sell the said property in the manner prescribed by law, and out of the money arising from said sale to retain the whole of said principal and interest, whether the same shall be then due or not, together

with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, its successors or assigns. And in any suit or other proceeding that may be had for the recovery of said principal sum and interest, on either said note or this mortgage, it shall and may be lawful for the said party of the second part, its successors and assigns to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel [12] employed in such suit, as well as all payments that the said party of the second part, its successors and assigns, may be obliged to make for its security by insurance or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises or any part thereof.

The party of the first part hereby warrants the title to the property above mortgaged and represents that the same are free and clear of incumbrances.

In witness whereof, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees.

RAYMOND BOX COMPANY.

By J. A. HEATH,
President.

Attest: MILES H. LEACH,
Secretary.

[Seal of Corporation.] [13]

State of Washington,
County of Pacific,—ss.

Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath as president and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name, together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he is secretary of said corporation, had signed the above instrument as secretary of said corporation by his free and voluntary act and deed, and the free and voluntary act and deed for said corporation.

Witness my hand and official seal.

[Notarial Seal]

H. W. B. HEWEN,

Notary Public, Residing at South Bend, Washington.

[14]

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

We, J. A. Heath and Miles Leach, President and Secretary respectively of the Raymond Box Company, a corporation, the above-named mortgagor,

after being duly sworn on oath, say that the foregoing mortgage is made in good faith and without any desire to hinder, delay or defraud creditors.

J. A. HEATH.

MILES H. LEACH.

Sworn to and subscribed before me this 2d day of December, 1910.

[Notarial Seal]

H. W. B. HEWEN,

Notary Public, Residing at South Bend, Washington.

[Endorsed:] "Filed this 18th day of March, 1912, at 2:00 P. M. Warren A. Worden, Referee in Bankruptcy." [15]

[Note, Dated December 2, 1911.]

\$23400. South Bend, Wash., December 2, 1911.

Three months after date, without grace, for value received, I, we, or either of us as principals, promise to pay to the PACIFIC STATE BANK or order, at their Bank in South Bend, Wash., TWENTY-THREE THOUSAND FOUR HUNDRED DOLLARS in United States Gold Coin, with interest thereon in like Gold Coin at the rate of EIGHT per cent. per annum from DATE until paid, interest payable AT MATURITY, QUARTERLY, and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible, at the option of the holder of this note.

If this note is not paid when due WE agree to pay all reasonable costs of collection, including attorneys' fees which the Court may adjudge or deem to be reasonable and proper, and also consent that judg-

ment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker or makers of this note, dissolution of partnership, retiring from or disposing of business, death, or any loss by fire, the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received each and every person signing or endorsing this note, hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as principal—not as security—and promises that if suit be brought to collect same or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisal laws of the State of Washington. [16]

RAYMOND BOX CO.

By J. A. HEATH, Pres.

MILES H. LEACH, Sec.

[Raymond Box Company Seal]

(#773)

[Endorsed]:

12-19-10. Pd. on within \$400.00.

12-12-10. “ “ “ 298.29.

12-28-10. “ “ “ 350.00.

Mar. 3, 1911. Int. Paid to 3-2-11-\$449.05.

Mar. 2-11. Balance due \$22,351.71.

11-29-11. Int. to 10-1-11-\$1038.11.

[17]

[Mortgage, Dated December 2, 1910—Raymond Box Co. to Pacific State Bank (Recorded).]

THIS INDENTURE made this 2d day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part:

WITNESSETH: That the said party of the first part for and in consideration of the sum of \$23,400, lawful money of the United States, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the party of the second part and to its successors and assigns, the following real and personal property, privileges and franchises, particularly described as follows, to wit:

Block B of the First Addition to Raymond, Pacific County, Washington, according to the plat thereof on record in the office of said county, together with all buildings and structures situated thereon.

Also a tract described as follows: Beginning at a point on bank of slough South $19^{\circ} 06'$ East 67.2 feet distant from the Southwest corner of 7th Street and Heath Street Avenue of the First Addition to the Town of Raymond, as the same has been platted by John Henry, Surveyor; thence North $74^{\circ} 22'$ East 130.8 feet; thence South $89^{\circ} 19'$ East 79.4 feet; thence North $55^{\circ} 57'$ East 56.1 feet; thence North $43^{\circ} 54'$ East 61.5 feet; thence North $83^{\circ} 54'$ East 76.7 feet; thence South $60^{\circ} 17'$ East 99.7 feet; thence

South $18^{\circ} 0'$ East 131.2 feet; thence South $62^{\circ} 22'$ East 58.4 feet; thence South $26^{\circ} 19'$ West 113.3 feet; thence North $50^{\circ} 32'$ West 104.3 feet; thence North $17^{\circ} 55'$ West 117.6 feet; thence North $41^{\circ} 46'$ West 34 feet; thence North $82^{\circ} 12'$ West 34.5 feet; thence South $44^{\circ} 14'$ West 105.32 feet; thence South $88^{\circ} 27'$ West 123 feet; thence South $80^{\circ} 55'$ East 56.4 feet; thence South $49^{\circ} 44'$ West 22.3 feet; thence [18] South $23^{\circ} 51'$ East 39.6 feet; thence North $19^{\circ} 06'$ West 122.8 feet to the place of beginning.

Also the grantor's right to use the channel or cut off slough beginning at a point 141.1 feet South and 571.7 feet East of the Southwest corner of 7th Street and Heath Street Avenue; of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North $57^{\circ} 18'$ East 165.5 feet; thence North $51^{\circ} 37'$ East 69.4 feet; thence North $31^{\circ} 11'$ East 108.2 feet; thence North $22^{\circ} 15'$ East 70.9 feet; thence South $72^{\circ} 4'$ East 121.4 feet; thence South $26^{\circ} 51'$ West 82 feet across slough; thence North $60^{\circ} 16'$ West 62.9 feet to bank of meander slough; thence South $89^{\circ} 27'$ West 61.4 feet; thence South $29^{\circ} 45'$ West 83.9 feet; thence South $57^{\circ} 0'$ West 199.7 feet; thence South $60^{\circ} 10'$ West 144.7 feet; thence North $26^{\circ} 19'$ West 113.3 feet to place of beginning.

Also the following machinery situated in the mill in said Block B: 1 Atlas Boiler $18' \times 72''$ — $4''$ Flue; 1 Atlas Twin Engine; Cylinder $11'' \times 16''$; 1 Union Machine Co. Drag-saw, Machine 48 stroke; 1 Log Jack; 1 Log carriage and feed works for same; 1 canting gear; 1 crane for lifting block; 1 Power bolter; with

70" inserted tooth saw; 1 Large Columbia Box Board Machine 52" saw; 1 Woods Double Surfacers; 1 Frank Machinery Co. Pony Planer; 3 rip-saw tables; two with adjustable saws and automatic feed; 1 double automatic feed cut off saw; 1 Hall & Brown 36" Circular Resaw; 1 Swing Cut-off with foot lever, friction feed; 1 Box Board Printer; 1 outfit for filing and grinding circular and band-saws including two grinding machines, two tying machines, Lamb Manufacture; 1 Planer knife, grinder, 1 Complete dust collecting system. All conveyors; all piping for dry kiln; 40 dry kiln trucks; 1 transfer truck; all railroad tracks; 1 Berlin Band resaw machine, including saws; [19] 1 Morgan Tongue and Groove Box Board and matcher; all belts, shafting, and transmission machinery, together with all fixtures and implements, real or personal property used in the operating of the plant of the Raymond Box Company, at Raymond, Washington, on said Block B and slough adjoining thereto.

Also contract for water privileges of mill with Raymond Water Co.

Also the safe, desk, tables, stove, letter-press and all office furniture of the first party situated on said premises, together with all and singular the tenements, hereditaments, appurtenances and privileges thereunto belonging.

It is also agreed that the first party shall keep the buildings and machinery insured in such standard fire insurance company as the party of the second part may designate during the life of this mortgage in the sum of not less than \$11,000, with loss, if any,

payable to the mortgagor, as its interest may appear.

In the event that the mortgagor fails to procure said insurance and deliver the policy therefor to the second party, the second party shall have the right to take out said insurance; and the premium cost thereof shall be deemed secured by this mortgage and included therein.

This agreement is intended as a mortgage to secure the payment of \$23,400, lawful money of the United States, together with interest thereon at the rate of 8 per cent per annum, payable at maturity, at the banking-house of the second party in South Bend, Washington, and according to the terms and conditions of one (payable in three months), promissory note, bearing even date herewith, made by the Raymond Box Company and payable to the order of the Pacific State Bank; and these presents shall be void if such payments be made according to the terms and conditions thereof, but in case [20] default is made in the payment of principal or interest of said promissory note, or any portion thereof as the same may become due and payable according to the terms and conditions thereof, or for breach of any of the covenants of this mortgage, then the party of the second part, its successors and assigns, are hereby empowered to sell the said property in the manner prescribed by law, and out of the money arising from said sale to retain the whole of said principal and interest, whether the same shall be then due or not, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand to the

said party of the first part, its successors or assigns. And in any suit or other proceeding that may be had for the recovery of said principal sum and interest, or either said note or this mortgage, it shall and may be lawful for the said party of the second part, its successors and assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such suit, a reasonable sum, which shall be taxed as part of the costs of such suit, as well as all payments that the said party of the second part, its successors and assigns, may be obliged to make for its security by insurance or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises or any part thereof.

The party of the first part hereby warrants the title to the property above mortgaged and represents that the same are free and clear of incumbrances.

In witness whereof, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees. [21]

RAYMOND BOX COMPANY.

By J. A. HEATH,
President.

Attest: MILES H. LEACH,
Secretary.

[Corporate Seal of Raymond Box Company.]

State of Washington,
County of Pacific,—ss.

Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in

and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath, as president, and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation. Witness my hand and official seal.

[Notarial Seal]

H. W. B. HEWEN,
Notary Public Residing at South Bend, Washington.

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

We, J. A. Heath and Miles H. Leach, president and [22] secretary respectively of the Raymond Box Company, a corporation, the above-named mortgagor, after being duly sworn on oath, say that the foregoing mortgage is made in good faith and without any desire to hinder, delay or *fraud* creditors.

J. A. HEATH.

MILES H. LEACH.

Sworn to and subscribed before me this 2d day of December, 1910.

[Notarial Seal] H. W. B. HEWEN,
Notary Public Residing at South Bend, Wash-
ington.

[Endorsed]: 12,640. 604 Raymond Box Com-
pany to Pacific State Bank.

State of Washington,
County of Pacific,—ss.

Received for record this 8th day of December, 1910,
at 1:15 o'clock P. M., and recorded at request of
Pacific State Bank in Book 30 of Mortgage Records
of Pacific County, Wash., on page 31.

Witness my hand and official seal.

E. A. SEABORG,
County Auditor.

State of Washington,
County of Pacific,—ss.

I, Oren C. Wilson, County Auditor of Pacific
County, Washington, do hereby certify that the
above, foregoing and attached, consisting of 5 sheets,
is a full, true and correct copy of an instrument here-
tofore filed in my office as a Chattel Mortgage, and
[23] also filed and recorded in my office as a real
estate mortgage.

In Testimony Whereof, I have hereunto set my
hand and affixed the official seal of my office this
twenty-third of March, nineteen twelve.

[Seal]

OREN C. WILSON,
County Auditor.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [24]

[Proof of Claim of Pacific State Bank.]

IN BANKRUPTCY.

At South Bend, Pacific County, Washington, in the said District of Washington, on the 23d day of July, 1912, came L. W. Homan of South Bend aforesaid, in the county of Pacific, in the said District of Washington, and made oath, and says that he is cashier of the Pacific State Bank, a corporation organized and existing under the laws of the State of Washington, engaged in the business of banking at South Bend, aforesaid, and that he makes this proof of claim for and in said bank's behalf, and by authority of said bank, and that Raymond Box Company, a corporation, against whom a petition for adjudication of bankruptcy has been filed, and adjudication entered, was at and before the filing of said petition, and still is, justly and truly indebted to said Pacific State Bank in the sum of Twenty-three Thousand seventeen and 29/100ths (\$23,017.29) Dollars; that the consideration of said debt is money loaned by said bank to the defendant; that no part of said debt has been paid, and that there are no setoffs or counterclaims to the same. That attached hereto is the original note and copy of mortgage given by said Raymond Box Company to said bank to secure said claim, which note shows all endorsements and payments thereon; that the only securities held by this

deponent for said debt are the real estate and chattel mortgage, a copy of which is hereto attached, and that the original instrument is now on file with and in the custody of the County Auditor for Pacific County, Washington, pursuant to the laws of the State of Washington.

That \$3,000.00 is a reasonable attorney's fee to be allowed claimant for collection of this note as provided therein.

L. W. HOMAN,

Subscribed and sworn to before me this 23d day of July, 1912.

[Seal]

H. W. B. HEWEN,

Notary Public in and for the State of Washington,
Residing at South Bend, Said State. [25]

COPY OF NOTE.

\$23,400.00 South Bend, Wash, December 2, 1910.

THREE MONTHS after date, without grace, for value received, I, we, or either of us as principals, promise to pay to the PACIFIC STATE BANK or order, at their Bank in South Bend, Wash. TWENTY-THREE THOUSAND & FOUR HUNDRED DOLLARS in United States Gold Coin, with interest thereon in like Gold Coin at the rate of EIGHT per cent per ANNUM from DATE until paid, interest payable AT MATURITY, QUARTERLY and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible, at the option of the holder of this note.

If this note is not paid when due we agree to pay all reasonable costs of collection, including attorney's

fees which the Court may adjudge or deem to be reasonable and proper, and also consent that judgment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker or makers of this note, dissolution of partnership, retiring from or disposing of business, death, or any loss by fire, the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received each and every person signing or endorsing this note, hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as principal—not as security—and promises that if suit be brought to collect same or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisement laws of the State of Washington.

RAYMOND BOX CO.

By J. A. HEATH, Pres. [26]

MILES H. LEACH, Sec.

#773.

[Endorsed]:

12-19-10. Pd on within \$400.00.

12-22-10. “ “ “ 298.29.

12-28-10. “ “ “ 350.00.

Mar. 3-11. Int. pd. to 3-2-11-\$449.05.

Mar. 2-11. Bal. Due 22,351.71.

11-29-11. Int. to 10-1-11-1038.11.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [27]

Stipulation [That Judge Hanford shall Decide Validity of Real Estate Mortgage Claim, etc., on Record Heretofore Made by Petition for Review, etc.].

It is hereby stipulated between A. S. Coats, the Trustee in the above-entitled matter, and the Pacific State Bank, Claimant, by their respective attorneys, that the Honorable C. H. Hanford shall decide the validity of the real estate mortgage claim of the Pacific State Bank against the bankrupt herein, and the validity of the chattel mortgage, claimed by the Pacific State Bank, to be held by it on the property of the said bankrupt, upon the record heretofore made by the Petition for Review of the order of the Referee in Bankruptcy filed herein, allowing the Pacific State Bank to foreclose its mortgage, and that said record and all of it be considered as properly taken before the said judge for such purpose, without further certification.

Provided that any such decision, affecting the validity and preference of said real estate mortgage and chattel mortgage, or either, shall be subject to the right of appeal by either party, and that the mere fact that such decision is made out of its order and in advance of the usual procedure in the allowance of claims, that the same shall not affect such right of appeal and the right of appeal by either party as to

the questions now decided, shall begin to run only from the time of the final allowance of such claim, if the Court shall decide the same to be a preference and such real estate and chattel mortgage legal and valid as against the creditors, it being the intention of both parties by this stipulation simply to save time and further certification, hearing and review, and that the usual rights of appeal shall be in no way affected.

And provided, further, that any decision now made as to the validity of said real estate mortgage and chattel mortgage shall not in any way be regarded as *res judicata* should the said claimant be [28] permitted to enter the State courts to foreclose its said mortgage.

Signed and dated this 22d day of July, 1912.

CHAS. E. MILLER,

Attorney for Trustee.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for Pac. State Bank.

[Endorsed]: "Filed United States District Court, Western District of Washington. Jul. 25, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [29]

Answer of Creditors to Petition of the Pacific State Bank.

Comes now the following named creditors, namely, Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell

Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quin-ault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, and answering the petition of the Pacific State Bank filed in the above-entitled matter, admit, allege, and deny as follows:

I.

Said answering creditors admit paragraphs number one, two and three of said petition.

III.

Answering paragraph number four of said petition these answering creditors deny each and every allegation contained in paragraph four of said petition, and the whole thereof, excepting they admit that said bankrupt made and delivered to petitioner on or about December 2d, 1910, an instrument a copy of which is attached to petitioner's petition, and marked Exhibit "A," and that the said instrument was recorded at the times and places stated in said paragraph, but answering creditors deny that said instru-

ment was [30] ever recorded as a chattel mortgage or in any chattel mortgage record.

III.

These answering creditors, answering paragraph number five of said petition, allege that they have no knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations contained in said paragraph, and therefore on their information and belief they deny the same, and put the said petitioner upon its proof.

IV.

These answering creditors deny each and every allegation contained in paragraph six of said petition, excepting they admit that in said Exhibit "A" that the property covered thereby consists of real and personal property, and that the same constitutes a manufacturing plant for the manufacture of boxes, and that in said plant there is a large amount of machinery and equipment installed therein.

V.

These answering creditors deny each and every allegation contained in paragraph number seven of said petition and the whole thereof.

VI.

Said answering creditors deny that petitioner's claim is a first mortgage and prior lien upon said property, or any part of said property, or that the same is a lien whatever on said property, or that the same is a lien at all in so far as these answering creditors are concerned. These answering creditors deny that petitioner has a first mortgage and prior lien, or

that it has any lien prior to the claims of these answering creditors or any of them. These answering creditors deny that the said instrument is a lien, [31] whatever, upon the property of said bankrupt, prior to the claims of any of these answering creditors.

VII.

These answering creditors, answering paragraph number nine of said petition, deny each and every allegation contained in said paragraph number nine and the whole thereof.

For a further separate answer and defense unto petitioner's petition, these answering creditors aver as follows:

I.

That the Pacific Transportation Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Cram Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the

courts of the United States and in the State of Washington.

That the Siler Mill Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions [32] at law or equity in the courts of the United States and in the State of Washington.

That the Willapa Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the W. W. Wood Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Lebam Mill & Timber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is en-

titled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Case Shingle & Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington. [33]

II.

That at all the times hereinafter mentioned the Raymond Box Company, the bankrupt herein, was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has its principal place of business at Raymond, Pacific County, Washington, and which said last named corporation was, on or about the —— day of ———, 1912, adjudged bankrupt by this court.

III.

That subsequent to December 2d, 1910, the said Raymond Box Company, the bankrupt herein, and prior to the time that it was adjudged a bankrupt, became indebted to and now is owing and indebted to these answering creditors in the sums of money set opposite their respective names as follows, to wit:

Pacific Transportation Company.....	\$160.77
Raymond Transfer & Cold Storage Company	31.55
Cram Lumber Company.....	291.49
Raymond Foundry & Machine Company....	229.50

Bell Brothers Hardware Company.....	75.12
Siler Mill Company.....	167.13
Willapa Lumber Company.....	2015.64
W. W. Wood Company.....	2534.22
Pierce Brothers.....	2019.13
J. E. Gardner.....	620.46
Standard Tow Boat Company.....	32.00
Case Shingle & Lumber Company.....	519.14
Quinault Lumber Company.....	76.39
Lebam Mill & Timber Company.....	114.95
Fern Creek Lumber Company.....	307.53
Gus Bacopolus.....	15.90
Mike Daniel.....	22.80
Victor Agren.....	149.00
Wm. A. Clark.....	74.50
Jim Hamalas.....	22.85
Gus Pansgas.....	23.50
Abe Taylor.....	22.96
F. H. Hesmer.....	24.50
L. E. Owens.....	133.50
Miles H. Leach.....	41.44
John Chepas.....	18.48
E. M. Hatch.....	183.30
Chas. Herman.....	32.47
Ethel Owens.....	17.50
J. A. Schultz.....	17.90
R. N. Skinner.....	16.38
Strat Nelson.....	16.13
Joseph Hatch.....	33.09
[34]	
H. F. Klimmer.....	13.10
L. H. Osborne.....	20.65
Jim Jamison.....	16.20

E. Norwick.....	13.97
Frank Walan.....	24.90
James Argeris.....	27.20
Arthur Bailey.....	17.88
Frank Sholes.....	29.35
Ben Vandeflow.....	115.05
Ed Leacock.....	17.35

And the amount set opposite the respective names of these answering creditors is due and owing to each of said creditors, and no part thereof has ever been paid, and each of said creditors has filed his claim herein in this bankruptcy proceeding for the same, and said claim is now on file herein.

IV.

That neither one of said answering creditors herein ever had any actual notice that said Raymond Box Company ever executed or delivered to said Pacific State Bank the promissory note of the instrument which said Pacific State Bank alleges to be a mortgage, until after said Raymond Box Company became owing and indebted to each of these answering creditors.

V.

That on December 2d, 1910, long prior thereto, and ever since said time, the laws of the State of Washington provided as follows, to wit:

That "certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of _____,

County of _____,—ss.

On this — day of ———, A. D. 190—, before me personally appeared ———, to me known to

be the (president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on [35] oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature and title of officer.)”

And the said laws are found on page 245 of the Session Laws of the State of Washington, for 1903.

VI.

That on and prior to December 2, 1910, and ever since said date the laws of the State of Washington provided and were as follows, to wit:

Sec. 3660. “A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property.”

Sec. 3668. “A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged

property is situated, in a book kept exclusively for that purpose."

VII.

That the said mortgage which the petitioner, Pacific State Bank, now seeks the leave of this Court to foreclose, a copy of which mortgage is attached to the said petition of said Pacific State Bank, marked Exhibit "A" and made a part thereof, is invalid and void, is not a lien upon the premises and property of the bankrupt therein described, the same gives no preference rights to the said Pacific State Bank, and is void, and the said Pacific State Bank is without lawful right to enforce the same as a preferred claim against said bankrupt estate, for the following reasons:

(a) The said alleged mortgage, Exhibit "A," was never completely executed by the bankrupt, and is not the mortgage of the bankrupt under the laws of the State of Washington, the facts of which will more fully hereinafter appear. [36]

(b) The said mortgage was not executed and acknowledged in accordance with the laws of the State of Washington, was not entitled to registration under the laws of the State of Washington, and the said petitioner acquired neither lien nor right, whatsoever, in the property described therein by virtue of said mortgage, and it is not entitled to foreclose the same.

That the said mortgage, as will more fully appear by inspection of the copy thereof, was not acknowledged, substantially or otherwise, as required by law; that a certificate of H. W. B. Hewen as a Notary Public of the State of Washington, purporting to be

a certificate of acknowledgment, is attached to said mortgage, but that it does not appear from said certificate that the said J. A. Heath and Miles H. Leach were known to the said notary public to be the president and secretary, respectively, of said bankrupt corporation; that it does not appear from said acknowledgment that they, the said officers, acknowledged the said instrument to be the free and voluntary act and deed of said corporation, nor that it was the free and voluntary act and deed of said corporation for the uses and purposes in said alleged mortgage mentioned; nor that the said J. A. Heath and Miles H. Leach stated on oath that they were authorized to execute said instrument, nor does it appear from said certificate of acknowledgment that the said J. A. Heath and Miles H. Leach on oath stated that the seal affixed was, in fact, the genuine corporate seal of said bankrupt corporation; nor does said purported certificate of acknowledgment contain any words or statements equivalent to those prescribed by said statute, nor does said purported certificate of acknowledgment substantially, or in any other manner, comply with the requirements of said statute, or any of the laws of the State of Washington, and the said purported certificate of acknowledgment is a mere nullity and of no greater weight than if no certificate [37] of acknowledgment at all had been attached to said alleged mortgage; that the laws of the State of Washington require that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance on real estate, shall be by deed, and that such deed shall be in writing, signed by the party bound

thereby, and acknowledged by the party making it before some person authorized by the laws of said State to take the acknowledgment of deeds, and that although the said alleged mortgage purports to have been recorded in the real estate records of mortgages, the same was not entitled to be recorded, and the said purported mortgage is to all legal intents and purposes an unrecorded, incomplete instrument.

VIII.

That by reason of the requirements of said Chapter 132 of the Session Laws of Washington for 1903, page 245, the sworn deposition of the officer or officers seeking to execute a mortgage upon the property of a corporation must be incorporated in the certificate of acknowledgment endorsed upon or attached to such mortgage, as a part of the execution of such mortgage, and that such mortgage is not complete until such deposition is made, taken and recorded in such certificate of acknowledgment; and that because the persons purporting to be the president and secretary of said corporation and signing said alleged mortgage, did not give their depositions that they were authorized by such corporation to make such mortgage, and that the seal alleged to be attached to such mortgage was, in fact, the genuine seal of such corporation; this respondent shows that the execution of said mortgage was not consummated as attempted, the same is no mortgage at all, and is not a lien for any purpose upon the property therein described.

IX.

That the indebtedness set forth in the note attempted [38] be secured by said alleged mortgage

was not originally incurred upon the day of the date of said mortgage; that the said amount of indebtedness set forth in said note is the aggregate of divers loans and discounts made by said petitioner to the said bankrupt at various times, and long prior to said December 2, 1910, which said previous indebtedness so incorporated in said note and attempted to be secured by said alleged mortgage prior to the date of said note was not secured by mortgage upon any of the property of the said bankrupt, if the same was secured at all, and that at the time of the making of said note, to wit, on December 2, 1910, the said bankrupt was indebted to the said petitioner as it had been for a long time previous thereto, as these creditors are informed and believe, and charge the truth to be, in a sum in excess of twenty thousand dollars; that the said H. W. B. Hewen, the officer whose name is appended to said certificate of acknowledgment and whose acts the same purports to certify and perpetuate, was at the time of the execution of said note and the attempted making and execution of said mortgage, and had been for a long time prior thereto, a stockholder of and in the said petitioner, Pacific State Bank, the same being a corporation organized, created and carrying on business under and by virtue of the laws of the State of Washington; that the said H. W. B. Hewen, as such stockholder in said petitioner corporation, was beneficially interested in the mortgage so sought to be made and executed to the petitioner by the said bankrupt, and would profit thereby in the proportion of the amount of stock held by him to the entire capital stock of said petitioner corporation, and it was not competent

nor permissible nor lawful for the said H. W. B. Hewen, being so materially interested, as aforesaid, to take and receive such acknowledgment, nor to make and record the same, and by reason of such interest of said notary public the said certificate was invalid and void. [39]

IX $\frac{1}{2}$.

That said instrument is also void and does not constitute any lien on the property of said bankrupt as against these answering creditors, for the reason that said instrument was not recorded in the office of the Auditor of Pacific County, Washington, as a chattel mortgage, nor in a book kept in said county Auditor's office, exclusively for that purpose; and because said instrument was not recorded as a chattel mortgage at all, the same having been recorded in the record of real estate mortgages in the office of the Auditor of said Pacific County, Washington, but was never recorded in any book kept for chattel mortgages or used for the recording of chattel mortgages in the office of the Auditor of said county at all, for that chattel mortgage must, under the laws of the State of Washington, be recorded in a book kept exclusively for that purpose, and recording such chattel mortgage or instrument purporting to be a chattel mortgage in the real estate records in the office of the Auditor in the county wherein such property is situated is not, under the laws of the State of Washington, actual or constructive notice to creditors of the mortgage or subsequent purchasers, and said instrument does not afford, under the laws of the State of Washington, constructive notice of any lien on the

personal property of said mortgagor, and is void as to these answering creditors of said bankrupt.

IX½.

That said mortgage or the execution thereof was not authorized by either the Board of Trustees or Stockholders of said Raymond Box Co.

X.

That none of the claims or the sums due to any of these answering creditors are secured, but each of the same is an unsecured claim and indebtedness against said bankrupt corporation.

XI.

That the whole of the indebtedness of said corporation, [40] including the amount of the indebtedness of these answering defendants, amounts to the sum of about \$36,902.00; that if the claim of the Pacific State Bank, petitioner, is held to be a first lien upon the properties of said bankrupt corporation, and if the property is now sold to satisfy said pretended mortgage of said Pacific State Bank, then there will be nothing left for these creditors or any of them, but if the property is not sold, and if the claim of the said Pacific State Bank is not held to be a first lien or any lien upon said property of said bankrupt, then these answering creditors will receive at least some part or portion of the sum due them; but if the claim of the Pacific State Bank is held to be a first and prior lien, or held to be a lien at all upon the property of said bankrupt, and the property is sold to satisfy the same, then there will not be sufficient funds to pay the costs of the bankruptcy

proceedings, nor any of the claims of these creditors.

XII.

These answering creditors further aver, that H. W. B. Hewen, who purports to have taken the acknowledgment to said pretended mortgage of the Pacific State Bank was, prior to and at the time of the taking of said acknowledgment, to wit, on December 2d, 1910, ever since has been and now is, a stockholder in the said Pacific State Bank, and beneficially interested therein; and these answering creditors aver that for that reason that the said H. W. B. Hewen was not qualified to take an acknowledgment to an instrument purporting to give unto said Pacific State Bank a mortgage upon this property of the bankrupt.

WHEREFORE, these answering creditors pray that the petition of the Pacific State Bank be denied; that the instrument which is attached to said petition and marked Exhibit "A" be declared [41] void and of no avail, as against these answering creditors, and that the same be held and adjudged not to be a lien upon the property of any of the property of the bankrupt, and that the said claim of the Pacific State Bank be held and adjudged not to be prior or superior to the claim or any of the claims of these answering creditors, and that the claims of these answering creditors be held to be entitled to payment the same as the claim of the Pacific State Bank, and that said instrument of the Pacific State Bank be held not to be a mortgage, or a lien upon any of the property of said bankrupt.

These answering creditors further pray that this court make and enter herein such other, further and separate order as may be lawful, just and equitable.

WELSH & WELSH,

Attorneys for Answering Creditors.

State of Washington,
County of Pacific,—ss.

I, Martin C. Welsh, being first duly sworn, upon my oath do depose and say, that I am one of the trustees and am also the treasurer of the W. W. Wood Company, which is a corporation of the State of Washington, and is one of the answering creditors herein; that I am authorized by the Board of Trustees of said corporation to make this verification for and on behalf of said corporation; that I have read the above and foregoing answer and know the contents thereof, and the same and the whole thereof is true, as I verily believe, and that I make this verification for and on behalf of said W. W. Wood Company, and also for and on behalf of the co-answering creditors.

MARTIN C. WELSH. [42]

Subscribed in my presence and sworn to before me this 17th day of April, A. D. 1912.

[Seal]

JOHN T. WELSH,

Notary Public for the State of Washington, Residing
at South Bend in Said State.

Due and legal service of the within answer is admitted by copy received April 19, 1912.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for Pacific State Bank.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Apr. 19, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy." [43]

Return of Trustee in Bankruptcy.

To the Honorable Judges of the Above-named Court,
and to the Honorable WARREN A. WORDEN,
Referee in Bankruptcy:

Comes now A. S. Coates, the Trustee in Bankruptcy in the above-entitled matter, and for cause why the petition of the Pacific State Bank for leave to foreclose its certain alleged mortgage on the real and personal property of the bankrupt herein should not be granted, respectfully shows as follows:

I.

This respondent, trustee as aforesaid, respectfully shows unto the Court that the said mortgage which the petitioner, Pacific State Bank, now seeks the leave of this Court to foreclose, a copy of which mortgage is attached to the said petition of said Pacific State Bank, marked Exhibit "A" and made a part thereof, is invalid and void, is not a lien upon the premises and property of the bankrupt therein described, the same gives no preference rights to the said Pacific State Bank, and is void, and the said Pacific State Bank is without lawful right to enforce the same as a preferred claim against said bankrupt estate, for the following reasons: [44]

(a) The said alleged mortgage, Exhibit "A," was never completely executed by the bankrupt, and is not the mortgage of the bankrupt under the laws of

the State of Washington, the facts of which will more fully hereinafter appear.

(b) The said mortgage was not executed and acknowledged in accordance with the laws of the State of Washington, was not entitled to registration under the laws of the State of Washington, and the said petitioner acquired neither lien nor right whatsoever, in the property described therein by virtue of said mortgage, and it is not entitled to foreclose the same.

And in support of the two foregoing causes, so shown by this trustee, he states and alleges, as true, the following facts:

That the said mortgage purports to be executed by J. A. Heath as President, and Miles H. Leach as Secretary of the bankrupt corporation; that at the time of the making of the said mortgage, to wit, December 2, 1910, the laws of the State of Washington, the same being still in force, provided the form and contents of the acknowledgments of corporation to instruments executed and acknowledged by corporations, the same being Chapter 132 of the Session Laws of Washington for 1903, page 245, and that such certificate of acknowledgments should be substantially in the following form:

State of _____

County of _____, —ss.

On this _____ day of _____, A. D. 190—, before me personally appeared _____, to me known to be the (president, vice-president, secretary, treasurer or other authorized officer or agent, as the case may be) of the corporation that executed the within and

foregoing instrument, and acknowledged the said instrument to be the free and voluntary [45] act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

(Certificate and title of officer.)

—that the said mortgage, as will more fully appear by inspection of the copy thereof, was not acknowledged, substantially, or otherwise, as required by law; that a certificate of H. W. B. Hewen, as a notary public of the State of Washington, purporting to be a certificate of acknowledgment, is attached to said mortgage, but that it does not appear from said certificate that the said J. A. Heath and Miles H. Leach were known to the said notary public to be the President and Secretary, respectively, of said bankrupt corporation; that it does not appear from said acknowledgment that they, the said officers, acknowledged the said instrument to be the free and voluntary act and deed of said corporation, nor that it was the free and voluntary act and deed of said corporation for the uses and purposes in said alleged mortgage mentioned; nor that the said J. A. Heath and Miles H. Leach stated on oath that they were authorized to execute said instrument, nor does it appear from said certificate of acknowledgment that the said J. A. Heath and Miles H. Leach on oath stated that

the seal affixed was, in fact, the genuine corporate seal of said bankrupt corporation; nor does said purported certificate of acknowledgment contain any words or statements equivalent to those prescribed by said statute, nor does said purported certificate of acknowledgment substantially, or in any other manner, comply with the requirements [46] of said statute, or any of the laws of the State of Washington, and the said purported certificate of acknowledgment is a mere nullity and of no greater weight than if no certificate of acknowledgment at all had been attached to said alleged mortgage; that the laws of the State of Washington require that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance on real estate, shall be by deed, and that such deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it before some person authorized by the laws of said state to take the acknowledgment of deeds, and that although the said alleged mortgage purports to have been recorded, the same was not entitled to be recorded and the said purported mortgage is to all legal intents and purposes an unrecorded, incomplete instrument.

II.

This respondent, trustee as aforesaid, further respectfully shows that by reason of the requirements of said chapter 132 of the Session Laws of Washington for 1903, page 245, the sworn deposition of the officer or officers seeking to execute a mortgage upon the property of a corporation must be incorporated in the certificate of acknowledgment endorsed upon

or attached to such mortgage, as a part of the execution of such mortgage, and that such mortgage is not complete until such deposition is made, taken and recorded in such certificate of acknowledgment; and that because the persons purporting to be the president and secretary of said corporation and signing said alleged mortgage, did not give their depositions that they were authorized by such corporation to make such mortgage, and that the seal alleged to be attached to such mortgage, was, in [47] fact, the genuine seal of such corporation; this respondent shows that the execution of said mortgage was not consummated as attempted, the same is no mortgage at all, and is not a lien for any purpose upon the property therein described.

III.

This respondent, trustee as aforesaid, further respectfully shows, that the indebtedness set forth in the note attempted to be secured by said alleged mortgage was not originally incurred upon the day of the date of said mortgage; that the said amount of indebtedness set forth in said note is the aggregate of divers loans and discounts made by said petitioner to the said bankrupt at various times, and long prior to said December 2, 1910, which said previous indebtedness so incorporated in said note and attempted to be secured by said alleged mortgage prior to the date of said note was not secured by mortgage upon any of the property of the said bankrupt, if the same was secured at all, and that at the time of the making of said note, to wit, on December 2, 1910, the said bankrupt was indebted to the said petitioner as it had been for a long time previous thereto, as

this respondent is informed and believes and charges the truth to be, in a sum in excess of twenty thousand dollars; that the said H. W. B. Hewen, the officer whose name is appended to said certificate of acknowledgment and whose acts the same purports to certify and perpetuate, was at the time of the execution of said note and the attempted making and execution of said mortgage, and had been for a long time prior thereto, a stockholder of and in the said petitioner, Pacific State Bank, the same being a corporation organized, created and carrying on business under and by virtue [48] of the laws of the State of Washington; that the said H. W. B. Hewen, as such stockholder in said petitioner corporation, was beneficially interested in the mortgage so sought to be made and executed to the petitioner by the said bankrupt, and would profit thereby in the proportion of the amount of stock held by him to the entire capital stock of said petitioner corporation, and it was not competent nor permissible nor lawful for the said H. W. B. Hewen, being so materially interested, as aforesaid, to take and receive such acknowledgment, nor to make and record the same, and by reason of such interest of said notary public the said certificate was invalid and void.

IV.

This respondent, trustee as aforesaid, further respectfully shows that a large portion of the property described in the said alleged mortgage consists of machinery, implements, furniture, movable fixtures and other personal property not a part of the realty, and that fully one-half of the property in value,

sought to be covered and incumbered by said mortgage is personal property and not realty; that section 3660 of Rem. & Bal. Codes of the State of Washington provides that a mortgage of personal property is void as against creditors of the mortgagor unless the same is acknowledged and recorded in the same manner as is required by law in conveyances of real property; that the said mortgage was on December 8, 1910, recorded as a real estate mortgage in Book 30 of Mortgages, page 31 of the records of said Pacific County, as stated in said petition herein; that because said mortgage was without a lawful certificate of acknowledgment the same was not entitled to be recorded as a chattel mortgage; and that, as a matter of fact and in truth, the said petitioner, Pacific State Bank, has never recorded the [49] said mortgage as a chattel mortgage, as required by the statute above referred to, and the said mortgage is wholly inoperative, ineffective and void as to the personal property and property other than realty therein described.

V.

This respondent, trustee as aforesaid, further respectfully shows, and reference is also had to the schedule of property, list of creditors, etc., of the bankrupt, filed in this court, that at the time of the adjudication of bankruptcy herein, the said bankrupt was indebted to sundry and divers persons upon notes, acceptances, open accounts and otherwise in the sum of \$13,102.19, outside of and aside from any and all indebtedness claimed in favor of the petitioner, Pacific State Bank, all of which said claims are unsecured, and that the total indebtedness of

said bankrupt amounts to the sum of more than \$36,902.17; that all of said unsecured indebtedness and indebtedness to others than the petitioner, was incurred by said bankrupt and accrued since and after December 2, 1910; and that respondent is informed and believes, and he charges the truth to be, that all of the said unsecured creditors became such creditors subsequent to December 2, 1910; that they, the said creditors, collectively or individually, did not have actual notice, constructive notice, or any notice at all at the several times upon which they became such creditors, of the existence of said alleged mortgage; that from and after December 2, 1910, the said petitioner, Pacific State Bank, claimed to have and hold a chattel mortgage upon said property, and during all of said period while said bankrupt was contracting additional debts, and up to the present time, the said petitioner failed and has failed to record said chattel mortgage in the manner required [50] by law, and the statute referred to in paragraph four hereof; and this respondent therefore shows and alleged that as against such subsequent and unsecured creditors the said alleged mortgage is invalid, and that in proof of the facts herein stated certain of said unsecured creditors have filed with this respondent their affidavits, which are attached to this return, marked Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," and the same are made a part hereof.

VI.

This respondent, trustee as aforesaid, further respectfully shows that, prudently handled and reasonable time being permitted, the real and personal

property comprising the assets and estate of said bankrupt can be sold for an amount sufficient to pay all claims against said estate, and the costs of administering the same, but that in order to accomplish this object entire harmony of effort among the several creditors of said estate is absolutely necessary; that said petitioner, Pacific State Bank, is a creditor to the amount of nearly two-thirds of the entire liabilities of said bankrupt; that if said petitioner is permitted, under the order of this Court, to foreclose its alleged mortgage, the said petitioner will be concerned only in securing upon such sale an amount sufficient for its own purposes and no more, and the burden will be upon the said other and unsecured creditors not only to secure a purchaser willing to pay the amount of said alleged mortgage debt, but an amount sufficiently in excess of such alleged mortgage debt to pay the expenses of administration, the claims for labor and an amount in addition to be paid on their own claims sufficient to warrant their personal efforts in that direction; and that if said petitioner, Pacific State Bank, is [51] permitted to foreclose its alleged mortgage and to sell said property to satisfy its claim, this respondent avers that, owing to the present general unsettled financial condition of the country, an amount greater than said alleged mortgage indebtedness will not be obtained, and there will not be a dollar of surplus to pay the expenses of administration, attorneys' fees, labor claims or said unsecured claims.

VII.

This respondent, trustee as aforesaid, further re-

spectfully shows that the nature of the property comprising the bankrupt estate, as an inspection of the description thereof in said alleged mortgage will show, is not such as will deteriorate in value by non-use to any material or even appreciable extent, and the loss from said property and machinery lying idle for a few months should have no weight in the consideration of said petition; that with proper care from the caretaker, no material damage can result to said property from idleness and there are no expenses to be incurred for rents or operating expenses; that the general lumber business and the financial times, generally, for the past four or five years, have been at a low ebb, but that there is now a noticeable improvement therein, and this respondent believes and submits, as a matter of general observation, that after the national nominating conventions in June shall have been held business conditions in the United States will so radically and materially improve that the value of the said bankrupt estate in six months from now will be very much greater than at any time during the next two months, and this respondent, after a long experience in the wood product business, respectfully tenders his belief and conviction that a sale of the property of said estate in the near future will be detrimental [52] to the interest of the creditors and ill-advised.

VIII.

This respondent, trustee as aforesaid, further respectfully shows, that he makes this return and protests against the granting and allowing of the said petition of the said Pacific State Bank for the leave

of this Court to foreclose its said alleged mortgage, not only as trustee of the said bankrupt and as the official representative of the unsecured creditors of said bankrupt, in the general discharge of the duties required of him by law, but, also, especially, by, at and upon the personal request of a considerable majority of the unsecured creditors of said bankrupt.

WHEREFORE: this respondent prays that the said petition of the said Pacific State Bank for leave to foreclose its said alleged mortgage be denied and overruled, to the end that, ultimately, the said petitioner shall be required to participate in the assets of said estate to the same extent and upon the same footing as the other unsecured creditors, only.

A. S. COATS,
Trustee. [53]

State of Washington,
County of Pacific,—ss.

A. S. Coates being duly sworn, according to law, deposes and says as follows:

1. That he is the duly elected, qualified and acting trustee in bankruptcy of the within entitled bankrupt estate.

2. That he has read the foregoing return to the said order of this Court to show cause, subscribed by him; that he knows the contents thereof, and that the facts therein stated are true, excepting as to such matters as are stated upon his information and belief, and as to such matters he believes the same to be true.

A. S. COATS.

Subscribed and sworn to before me this 17th day of April, A. D. 1912.

[Seal]

F. D. COUDEN,

Notary Public for the State of Washington, Residing at Raymond in Said County.

CHAS. E. MILLER,

Attorney for Trustee, South Bend, Wash.

[54]

Exhibit "A" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of Samuel McMurran.

State of Washington,
County of Pacific,—ss.

Samuel McMurran, being first duly sworn, upon oath deposes and says: That he is a resident of Raymond, Pacific County, Washington; that he is employed as bookkeeper for the W. W. Wood Company of this city; that he has had 25 years' experience as a bookkeeper.

That on or about the 15th day of February, 1912, A. S. Coats, who was then temporary receiver for the Raymond Box Company, delivered to him all the books, statements, checks, accounts and records of the Raymond Box Company, and requested that he audit the books and prepare a statement, and that thereafter he did examine and audit said books and accounts of the Raymond Box Company, and from the audit so made, found, and now finds that the pur-

ported mortgage now held by the Pacific State Bank, and which the bank alleges was given by the Raymond Box Company to secure a note in the sum of \$23,400.00 was given and dated on December 2, 1910, and was given for a pre-existing debt.

That at the time said purported mortgage was given as aforesaid, the amount due thereon was the only sum which the Raymond Box Company then owed and at that time it had no indebtedness whatever, except the amount due on said note and purported mortgage, and all of the accounts which it now owes and which was owing at the time it was adjudicated a bankrupt, have been created since the execution of said instrument, and said accounts in addition to the amount due to said bank, amount in the aggregate to about \$14,000.00.

That all of the creditors shown on the statement filed in the above proceedings by A. S. Coats and all of the creditors which have presented claims in the above-entitled matter, became creditors of the Raymond Box Company after the execution of said purported mortgage. [55]

SAMUEL McMURRAN.

Subscribed and sworn to before me this 15th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond, Washington. [56]

Exhibit "B" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of Miles Leach.

State of Washington,
County of Pacific,—ss.

Miles Leach, being first duly sworn, upon his oath deposes and says: That he now is, and at all the times hereinafter mentioned, has been the secretary of the Raymond Box Company, the above named bankrupt; that he is familiar with the books of said bankrupt and with the amount due and owing the various creditors and knows approximately the date and the indebtedness due each creditor was contracted.

That on or about the 2d day of December, 1910, said Raymond Box Company became indebted to the Pacific State Bank of South Bend, Washington, in the sum of \$23,400.00, which is the same indebtedness which the Pacific State Bank, aforesaid, claims is secured by the said instrument, which said bank alleges to be mortgage, and which is attached to its petition in the above-entitled cause, wherein it asks permission to foreclose said purported mortgage.

That at the time said bankrupt became indebted to said bank as aforesaid, it was not indebted to any other person, firm or corporation, and all of the indebtedness which it now owes and which it owed at

the time of the adjudication of bankruptcy, was contracted after the execution of said instrument, which the Pacific State Bank is attempting to foreclose as a mortgage, and all of the creditors which are now creditors of said bankrupt, became such creditors after the execution of said instrument.

MILES H. LEACH.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [57]

Exhibit "C" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of Ralph Gerber.

State of Washington,
County of Pacific,—ss.

Ralph Gerger, being first duly sworn, upon his oath deposes and says: That he is now and during all the times hereinafter mentioned, has been the manager of the Raymond Foundry & Machine Company, one of the creditors of the Raymond Box Company, Bankrupt

That the indebtedness due said Raymond Foundry & Machine Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Ray-

mond Box Company, said Raymond Foundry & Machine Company, did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

RALPH GERBER.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,

Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [58]

Exhibit "D" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of W. S. Cram.

State of Washington,
County of Pacific,—ss.

W. S. Cram, being first duly sworn, upon his oath deposes and says: That he now is and during all the times hereinafter mentioned has been the secretary of the Siler Mill Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Siler Mill Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Siler Mill Company did not have, nor neither did any of its agents have any actual knowledge that the Pa-

cific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

W. S. CRAM.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,

Notary Public in and for the State of Washington,

Residing at Raymond in Said State. [59]

Exhibit "E" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of F. C. Schoemaker.

State of Washington,
County of Pacific,—ss.

F. C. Schoemaker, being first duly sworn, upon his oath deposes and says: That he now is, and during all the times hereinafter mentioned, has been the secretary of the Willapa Lumber Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Willapa Lumber Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Willapa Lumber Company did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

F. C. SCHOEMAKER.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [60]

Exhibit "F" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of A. S. Coats.

State of Washington,
County of Pacific,—ss.

A. S. Coats, being duly sworn, upon his oath deposes and says: That he now is and at all the times hereinafter mentioned has been the manager of the W. W. Wood Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said W. W. Wood Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said W. W. Wood Company did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

A. S. COATS.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,
Notary Public in and for State of Washington, Re-
siding at Raymond, Wash. [61]

Exhibit "G" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of R. V. Pearce.

State of Washington,
County of Pacific,—ss.

R. V. Pearce, being first duly sworn, upon his oath deposes and says: That he is a member of the firm of Pearce Bros., one of the creditors of the Raymond Box Company, the above-named bankrupt, and that Pearce Bros. have presented their claim and filed the same in said bankruptcy proceedings; that the indebtedness due Pearce Bros. by the Raymond Box Company was contracted long after the 2d day of December, 1910, and at the time said indebtedness was contracted, affiant did not know, and neither did any member of the firm of Pearce Bros. know that the Pacific State Bank of South Bend, Washington, claimed to hold a mortgage on the property of the Raymond Box Company, but on the contrary, before the credit was extended to the Raymond Box Company, affiant knew that the Raymond Box Company was banking with the Pacific State Bank and affiant interviewed Lester Homan, the cashier of said bank

and advised with him relative to extending credit to the Raymond Box Company, and Mr. Homan advised affiant that it was perfectly safe.

That at the time that affiant talked with Mr. Homan as above recited, affiant knew absolutely nothing about the financial condition of the Raymond Box Company, and would not have extended it any credit whatever, had it not been for the statements and representations of Mr. Homan, which affiant believed at that time to be true, and he believed that Mr. Homan was in a position to know and did know the financial condition of said bankrupt.

RALPH V. PEARCE.

Subscribed and sworn to before me this 17th day of April, A. D. 1912. [62]

[Seal]

MARTIN C. WELSH,

Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [63]

Exhibit "H" [to Return of Trustee].

*In the United States District Court, for the Western
District of Washington, Southern Division.*

In the Matter of the **RAYMOND BOX COMPANY,**
Bankrupt.

Affidavit of T. H. Bell.

State of Washington,
County of Pacific,—ss.

T. H. Bell, being first duly sworn, upon his oath deposes and says: That he is now and during all the times hereinafter mentioned has been the manager of the Pacific Transportation Company, one of the

creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Pacific Transportation Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Pacific Transportation Company, did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

T. H. BELL.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal]

MARTIN C. WELSH,

Notary Public in and for the State of Washington,
Residing at Raymond, Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. April 19, 1912. A. W. Engle, Clerk. James C. Drake, Deputy." [64]

Replication to Answer.

The Pacific State Bank, petitioner herein, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the creditors to the petition of the Pacific State Bank, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said creditors, and that the answer of the said creditors is very uncer-

tain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Solicitors for Petitioner, 408 Perkins Bldg., Tacoma,
Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [65]

Replication to Return of Trustee.

The Pacific State Bank, petitioner herein, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the return of the trustee to the petition of the Pacific State Bank, for replication thereunto saith that it doth and will aver, maintain and prove its said petition to be true, certain, and sufficient in the law to be answered unto by the said creditors, and that the answer of the creditors is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter

or thing in the said answer contained, material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Solicitors for Petitioner, 408 Perkins Bldg., Tacoma,
Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [66]

Affidavit of M. H. Leach.

M. H. Leach, being first duly sworn, on oath says: That he was on the 2d day of December, 1910, the duly elected and qualified secretary of the Raymond Box Company, a corporation, and mortgagor in that certain instrument dated December 2d, 1910, to the Pacific State Bank, a corporation, with its principal place of business at South Bend, Washington;

That at the time of the execution and delivery of said mortgage, the same being in the sum of Twenty-three Thousand Four Hundred (\$23,400.00) Dollars, J. A. Heath, who executed said mortgage as president of said corporation, and this affiant, who executed said mortgage as secretary thereof, were the sole trustees of said corporation, and the owners of all of the capital stock thereof;

That the corporate seal attached to said mortgage was and is the authorized corporate seal of the Raymond Box Company, mortgagor, and was affixed to said mortgage by this affiant as secretary thereof.

MILES H. LEACH.

Sworn to and subscribed before me this sixteenth day of April, A. D. 1912.

[Seal]

H. W. B. HEWEN,

Notary Public in and for the State of Washington,
Residing at South Bend, in Said State.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [67]

*In the Superior Court of the State of Washington,
in and for the County of Pacific.*

ALEXANDER McKENZIE, Administrator of the
Estate of EFFIE A. McKENZIE, Deceased,
Plaintiff,

vs.

J. ALBERT HEATH,

Defendant.

Findings of Fact and Conclusions of Law.

Be it remembered that the above-entitled action came on regularly for trial on the 17th day of February, A. D. 1912, in said court, before the Honorable Sol Smith, Judge of said court, the plaintiff being represented by his attorney of record, Fred M. Bond, and the defendant having not appeared in said cause. And that more than 20 days have elapsed since said service of the summons and complaint upon the de-

fendant, which was a personal service at the City of Raymond, Pacific County, Washington, as appears by the files and records in this cause. And the said defendant having been duly defaulted for not appearing or demurring, or answering said complaint, and the Court having taken and heard all of the testimony on the part of the plaintiff, and after being duly advised in the premises, rendered its opinion that the plaintiff was entitled to recover for the sums demanded in his complaint, and directed Findings of Fact and Conclusions of Law to be as follows, to wit:

1.

That the plaintiff is the duly, legally, and qualified administrator of Effie A. McKenzie, deceased, and that he has the right to carry on this action, he being substituted as plaintiff in the name of Effie A. McKenzie as the records now on file in this case more fully show.

2.

That Effie A. McKenzie, the original plaintiff in the above-entitled action, on the 5th day of September, 1910, departed this life at the City of Raymond, Pacific [68] County, Washington, and that prior to her death and at the time of commencing this action she was a *bona fide* resident of said city of Raymond.

3.

That after her death, and, to wit: On the 7th day of November, 1910, the above-named administrator, Alexander McKenzie, administrator, of said state, was duly and legally appointed administrator of said estate of said Effie A. McKenzie, deceased; and that

thereafter, to wit, on the 10th day of March, 1911, said administrator duly and legally qualified according to law, and the letters of administration were on that date issued to him, giving him authority to handle and close up said estate.

4.

That at the time of commencing of the above said action, the said defendant, J. Albert Heath, was a resident of the city of Raymond, Pacific County, State of Washington. And that on February 1st, 1907, said defendant executed to plaintiff his certain promissory note in writing for the sum of Three Hundred (\$300.00) Dollars, which certain note was due and payable six months after date.

5.

That after the execution of the above said promissory note the said defendant paid on said promissory note, to Effie A. McKenzie, the sum of One Hundred (\$100.00) Dollars, and that there is now due and owing on said note the sum of Two Hundred (\$200.00) Dollars, and interest on the same at six per cent per annum from February 1st, 1907; and that the said party was the owner of said note at the time of her death.

6.

That the said defendant, on or about May 1st, 1908, [69] entered into a written agreement with the plaintiff whereby the said defendant, for valuable considerations, did sell to the said Effie A. McKenzie an undivided one-half interest in forty shares of the capital stock of the Raymond Box Co. under the following conditions:

1st. Defendant reserved the right to vote all shares of stock at any of the meetings of the company.

2d. Said stock to be not transferable.

3d. Stock to be turned over in the regular way by certificate by the said defendant to the said Effie A. McKenzie as soon as the present certificates are released from bank, where the same are held as security for a loan to the Raymond Box Co.

7.

That since the making and entering into of the contract last above mentioned, and to wit: During the month of August, 1910, the said defendant absolutely converted said stock to his own use and sold and transferred and delivered the same to other parties, and collected the cash for the same.

8.

That the value of said shares of stock on the 1st day of May, 1908, and also on the date that the defendant converted the same to his own use, were reasonably worth the sum of Two Thousand (\$2,000.00) Dollars. And that the said Effie A. McKenzie on the said date, May 1st, 1908, paid to the said defendant the sum of Two Thousand (\$2,000.00) Dollars in cash, for said interest.

9.

That since the starting of the above said action the said defendant paid to the above-named plaintiff, said administrator of the estate of Effie A. McKenzie, deceased, the sum of Fifty (\$50.00) Dollars on said contract, leaving a balance of One Thousand Nine Hundred Fifty (\$1,950.00) Dollars. [70]

And that there is now due and owing from the de-

fendant to the said estate the sum of One Thousand Nine Hundred Fifty (\$1,950.00) Dollars, and interest on the same at six per cent from the 1st day of May, 1908.

And as conclusions of law from the foregoing findings of fact, the Court concludes as follows:

That the plaintiff is entitled to a judgment against the defendant, J. Albert Heath, for the sum of Two Thousand One Hundred Fifty (\$2,150.00) Dollars principal, and the sum of Four Hundred Ninety-four (\$494.00) Dollars, interest on said amount up to the present day.

Done in open court this 17th day of February, A. D. 1912.

SOL. SMITH,
Judge of Said Court.

Filed April 18th, 1912. E. A. Seaborg, Clerk. By
R. S. Van Tuyl, Deputy. [71]

*In the Superior Court of the State of Washington
in and for the County of Pacific.*

ALEXANDER McKENZIE, Administrator of the
Estate of EFFIE A. McKENZIE, Deceased,
Plaintiff,

vs.

J. ALBERT HEATH,

Defendant.

Judgment.

In this action the defendant above named having been regularly served with process and summons and complaint in the above-entitled action, personally on the 12th day of August, 1910; and that more than

twenty days having elapsed since said service, and that due proof of said service has been filed with the Clerk of said court in the above-entitled action. And the defendant not having appeared in said action, nor filed any answer nor demurrer to the complaint filed therein, and the default of said defendant, J. Albert Heath, and the premises, having been duly taken and entered according to law. And witnesses for the plaintiff having been duly sworn and testified, the cause submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writing, and orders that judgment be rendered herein in favor of plaintiff in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant a judgment for the sum of Two Thousand Six Hundred Forty-four (\$2,644.00) Dollars and costs of this action to be taxed.

Done in open court this 17th day of February, 1912.

SOL. SMITH,

Judge of Said Court.

Filed April 18, 1912. E. A. Seaborg, Clerk. By R. S. Van Tuyl, Deputy. [72]

State of Washington,
County of Pacific,—ss.

I, E. A. Seaborg, Clerk of the Superior Court of the county and State aforesaid, hereby certify the foregoing to be a full, true and correct copy of the Findings of Fact and Conclusions of Law of the

Judgment in cause numbered 2809, entitled, Alexander McKenzie, Administrator of the Estate of Effie A. McKenzie, deceased, plaintiff, versus J. Albert Heath, defendant. That I have compared the same with the original and is correct transcript thereof as the same remains on file and of record in my office.

Witness my hand and the seal of said Superior Court this 18th day of April, 1912.

[Seal]

E. A. SEABORG,
Clerk of Superior Court.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [73]

Motion [to Amend Petition].

Now comes The Pacific State Bank and moves the Court that it be allowed to amend its Petition herein, a copy of which amendment is attached hereto, marked Exhibit "A," the said amendment to begin at the end of line 28 of page 3 of the Petition.

This Motion is based upon the entire records and files of this cause and upon the Affidavit of H. W. B. Hewen, attached hereto.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank. [74]

*United States District Court, Western District of
Washington, Southern Division.*

No. —.

EXHIBIT "A."

In the Matter of RAYMOND BOX COMPANY,
Bankrupt.

Amendment to Petition of the Pacific State Bank.

"That said mortgage and the note secured thereby were executed on behalf of the corporation of Raymond Box Company, bankrupt, by J. A. Heath and Miles H. Leach, its President and Secretary, respectively, the said Heath and the said Leach being all of the trustees of said corporation and being the owners of all of the capital stock of said corporation and being in sole control of said corporation, and said corporation accepted and retained the benefits of said transaction.

WHEREFORE, the Raymond Box Company and the trustee in bankruptcy and the creditors of the corporation, are estopped to deny the authority of said officers to execute said mortgage on behalf of said corporation."

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank. [75]

*United States District Court, Western District of
Washington, Southern Division.*

In the Matter of RAYMOND BOX COMPANY,
Bankrupt.

VERIFICATION.

United States of America,
District of Washington,
Western Division,—ss.

Joseph G. Heim, being first duly sworn, deposes and says on oath *deposes and says*: That he has read the foregoing proposed amendment, knows the contents thereof and that the same are true. That I am president of said Pacific State Bank and make this verification in behalf of same.

JOSEPH G. HEIM.

Subscribed and sworn to before me this 5th day of August, 1912.

[Seal]

H. W. B. HEWEN,
Notary Public in and for the State of Washington,
Residing at South Bend Therein. [76]

*United States District Court, Western District of
Washington, Southern Division.*

No. —.

In the Matter of RAYMOND BOX COMPANY,
Bankrupt.

Affidavit of H. W. B. Hewen.

United States of America,
District of Washington,
Western Division,—ss.

H. W. B. Hewen, being first duly sworn, deposes

and says on oath that he is one of the attorneys for the Pacific State Bank, a corporation, petitioner herein. That the amendment sought to be made to the petition by petitioner is not sought for the purpose of vexation or delay, but that the matter of the proposed amendment is, in the opinion of affiant, material, and could not with reasonable diligence have been introduced sooner into the petition.

That the question of the validity of the mortgage of the petitioner was submitted to the Honorable C. H. Hanford by oral stipulation to the above Court between counsel in open court, and that the record then before the Court on the petition for review of the order of the referee, granting leave to petitioner to foreclose its mortgage, should be considered to be before the Hon. C. H. Hanford for the purpose of determining the validity of said mortgage. That actual execution of said mortgage by bankrupt was not questioned either upon argument or in the pleadings, excepting upon the grounds of the alleged insufficiency of the acknowledgment and upon the alleged failure to record the mortgage as a chattel [77] mortgage, although it was admitted to have been filed as a chattel mortgage and recorded as a real estate mortgage. That until the opinion of the Honorable C. H. Hanford was promulgated, affiant and all of the attorneys for the petitioner, and as affiant believes, the attorneys for the trustee and for the creditors, did not consider that the authority of the president and secretary of said corporation to execute said instrument was in issue, but in view of the said opinion being promulgated, affiant and the

other attorneys for the petitioner believe it only prudent to amend the petition so as to allege an estoppel and to conform to the proof actually and without objection admitted.

Further affiant saith not.

H. W. B. HEWEN.

Subscribed and sworn to before me this 5th day of August, 1912.

[Seal]

P. W. RHODE,

Notary Public in and for the State of Washington,
Residing at South Bend Therein.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 7, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [78]

**[Order Granting Pacific State Bank Leave to
Amend Petition, and Denying Offer of Attorney
for Trustee.]**

The motion of Pacific State Bank for leave to amend its petition herein by adding certain words, beginning at the end of line 28, on page 3 of the petition, coming on this day to be heard, the said bank appearing by H. W. B. Hewen and Messrs. Hayden & Langhorne, its attorneys; the trustee appearing by Charles E. Miller, his attorney, and certain creditors claiming the right to appear by Messrs. Welsh & Welsh; it appearing to the Court that due notice of said application has been given and that said motion for leave to amend is in effect only to conform with the proof introduced without objection, and although the trustee offered upon said motion the following exhibit, marked "Exhibit No. 1," to wit:

[EXHIBIT NO. 1.]

**Affidavit of Charles E. Miller in Opposition to
Motion to Amend Petition.**

State of Washington,
County of Pierce,—ss.

Charles E. Miller of Pacific County, being duly sworn according to law deposes and says as follows:

1. That he is now and has been for thirty-eight years last past a licensed attorney at law, following his profession as such for his entire ten years of residence at South Bend in said County of Pacific.

2. That for eight years last past, he has been acquainted with J. A. Heath, the President of said bankrupt Raymond Box Company; that he has known Effie A. Scott during her lifetime, was well acquainted with her for thirty years; that said Effie A. Scott was on May 1st, 1908, a resident of Raymond, said County of Pacific, and was employed as housekeeper by the said J. A. Heath at the boarding house of said Bankrupt plant.

That on or about May 1st, 1908, the said J. A. Heath sold an equal and undivided half interest of forty shares of the capital stock of the said Bankrupt Company, which transaction was evidenced by said parties [79] by the written instrument, a copy of which is herewith attached and marked Exhibit "A"; and that as attorney of Effie A. Scott, deponent made demand on said J. A. Heath of said stock, the said Heath, then and there admitted to this deponent that he had entered said contract with Effie A. Scott, that she was owner of the shares

therein described, that all of said shares had been deposited in the Pacific States Bank as collateral security for a loan and that as soon as a release could be secured he would deliver said stock.

That after repeated demands on said Heath and failure on his part to deliver said stock, this deponent began action on transaction that he has failed herein to recover the said stock, due personal services being had on the said J. A. Heath.

That Effie A. Scott died September, 1910, that Alex MacKenzie, the then husband of the said Effie A. Scott, was appointed administrator of her estate and that said shares of stock was taken inventory as part of the said estate.

That thereafter to wit: on December 2nd, 1910, the mortgage in question herein was made and whereupon the said Heath obtained possession of said stock, converted same to his use and later the said judgment was rendered.

That on May 8th, 1911, the said Heath wrote the administrator that as he only realized ten per cent. on said stock, that the actual amount had on said Effie A. Scott one-half interest was not large and that he enclosed the sum of Fifty Dollars on account of same. That this deponent has said original letter which he knows to be in the handwriting and to be the letter and act of said J. A. Heath, and he tenders same for the inspection of the Court and Council to be filed if the Court shall direct.

That said J. A. Heath acknowledged to this deponent repeatedly that said Effie A. Scott was the

owner of said stock and therefore was not questioned.

CHARLES E. MILLER.

Subscribed and sworn to before me this day,
August 12, 1912.

R. W. JAMIESON,
Deputy Clerk. [80]

EXHIBIT "A."

This agreement made this first day of May, 1908, between J. A. Heath, party of the first part, and Effie A. Scott, party of the second part, witnesseth:

The party of the first part for the sum of one dollar and other valuable consideration sells to party of the second part and undivided half interest in forty shares of the capital stock of the Raymond Box Company under the following conditions:

First: Party of first part reserves the right to vote all shares of stock at any of the meetings of the Company.

Second: The said stock to be not transferable.

Third: The stock to be turned over in the regular way *be* certificate by party of first part, to parties of first and second parts as soon as the present certificates are released from bank where same are held as security for a loan to the Raymond Box Company.

(Signed) J. A. HEATH,

EFFIE A. SCOTT.

And the letter of J. A. Heath, dated May 8, 1911, marked "Exhibit No. 2," to wit:

[EXHIBIT NO. 2.]

[Letter Dated May 8, 1911, from J. A. Heath to "Dear Friend Alex."]

"Vancouver, May 8th, 1911.

Dear Friend Alex:

I received your letter in due time but have been very slow answering. I am glad to know that you have got through with the main part of the trouble in getting the affairs of the estate settled. I got a few lines from Stanley and he was saying he had been paying a visit to his Aunt Ida and he was telling me how many little chickens she had. I am just leaving *her* for Seattle where I will be staying for a few days and I am then going to Portland for a week and from there to San Francisco where I expect to remain till about the 10th of June and will then return to Vancouver. You will understand Alex that in selling out the Raymond business we had lost so much money during the depression that we only realized 10% on the stock, so the amount actually due on Effie's half interest was not very large but all the same Alex I shall continue making payments beyond the time same is settled and have decided to commence by sending the sum of Fifty Dollars on account of same and will continue paying said sum every six months with interest from this date, [81] and will enclose a draft in this letter for this amount. I want also to express my *apreciation* to you of how good you have been in this matter. I used to tell Effie many a time that I felt like taking off my hat to you for your goodness and untiring patience in every matter where she was concerned, and I assure you I feel the same now. You may tell Stanley

while I am in San Francisco I shall look up if possible a better printing press for him for I know he feels very much interested in the printing business and I think if he had a better one he would make quite a little money on the side from that source, beside being a pleasure to him. I wish you would write me to Portland and tell me all the news—what the Box Factory are doing at this time and what they intend turning the place into. I feel interested in knowing if same will be made into a veneer plant. Give my respects to all the folks—Stanley and yourself.

Yours truly,

J. A. HEATH.

You can address General Delivery—Portland or San Francisco.”

The Court declined to permit the same to be filed, read in evidence or to be considered, whereupon it was

ORDERED that leave to amend be and it is granted to the Pacific State Bank; that the proposed amendment to the petition filed herein on the — day of August, 1912, stand as the amendment to said petition, and the offer of the attorney for the trustee to introduce his affidavit, dated August 12, 1912, and the letter of J. A. Heath to the administrator of the estate of Effie MacKenzie, not being germane to the motion before the Court, it is denied, to all of which the attorney for the trustee excepts and his exception is allowed.

Dated this 12th day of August, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 13, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy. [82]"

[Order of Referee Granting Petition of Pacific State Bank for Leave to Foreclose Mortgage in Proper Court Having Jurisdiction Thereof, and to Make Trustee a Party, etc.]

Order of Referee Denying Leave to Foreclose Mortgage.

This matter having come on for hearing on the order to show cause why the petition of the Pacific State Bank for leave to foreclose its mortgage claimed by it on the real and personal property of the bankrupt, which said mortgage is specifically set out in said petition should not be granted, the petitioner appearing by H. W. B. Hewen and Hayden & Langhorne, its attorneys, the trustee appearing by Charles E. Miller, his attorney, and numerous creditors appearing by Welsh & Welsh, their attorneys, the Court having permitted said creditors to intervene and file their answer to said petition herein. The Referee in Bankruptcy being duly advised in the premises, and it appearing to the Referee that the return of the trustee and the answer of said creditors makes certain allegations intended to question the validity of the said mortgage upon grounds specifically set out in said return and said answer, and the Court being of the opinion that such questions ought not to be determined by this Court at this time, and in a summary proceeding, and in this proceeding, but if questions as to the validity of said mort-

gage exist, such questions are proper as a matter of defense in any proceeding which may be begun for the foreclosure of said mortgage, and the Referee therefore grants the petition of the Pacific State Bank for leave to foreclose said mortgage in the proper court having jurisdiction thereof, and to make the trustee in bankruptcy herein a party, and directs the trustee in bankruptcy to enter his appearance in the way of defense, or by [82a] intervention as he may be advised is proper, in any such proceeding, to which order and ruling of the Court, the trustee, by his attorney, Charles E. Miller, and the creditors who filed their return herein **by their** attorneys, Welsh & Welsh, duly *excepts*, asks for a certificate from the referee to the Judge for the reason that they contend that the Referee should at this time determine whether or not said mortgage was a valid mortgage, and if he should determine it was not a valid mortgage, that he should then refuse to grant permission to the Pacific State Bank to foreclose said mortgage.

Done in open court this 19th day of April, 1912.

WARREN A. WORDEN,

Referee in Bankruptcy.

[Endorsed]: "Filed on this 19th day of April, 1912. Warren A. Worden, Referee in Bankruptcy."
[82b]

Stipulation of Facts.

It is agreed between the parties hereto for the purposes of appeal as follows, to wit:

That the bankrupt is justly and truly indebted to

the Pacific State Bank in the sum evidenced by the note hereinafter described; that the consideration of said debt is money loaned by said bank to the bankrupt; that there was on March 18, 1912, due on the note evidencing such indebtedness the sum of \$22,351.71, with interest from October 1, 1911, at eight per cent per annum, no part of which has been paid, and the same was and is long past due and owing; that the original note was duly filed with the claim of the said bank and withdrawn by the order of Court, and that the copy thereof now attached to the claim is a true and literal copy of the original note; that the copy of the instrument claimed by the Pacific State Bank to constitute a mortgage, certified by the auditor of Pacific County under date of March 23, 1912, and filed in this court July 26, 1912 (after the petition for review of the order of the Referee in Bankruptcy had been served and filed), is a true and literal copy of the original instrument of which it purports to be a copy; that at the time of the execution and delivery of said instrument, to wit, December 2, 1910, J. A. Heath, who executed the same as president of the corporation, and Miles H. Leach, who executed the same as secretary thereof, were respectively president and secretary of said corporation; that the evidence as to whether the said president and secretary were the sole trustees of said corporation and were the owners of all the capital stock thereof consists of the affidavit of Miles H. Leach, and the findings and judgment of the Superior Court of the county of Pacific in the case of Alex McKenzie, administrator, vs. J. Albert Heath; that

the corporate seal attached to said instrument was and is the [83] authorized corporate seal of the bankrupt and was affixed to said instrument by the secretary, as secretary thereof; that the said instrument was filed for record in the office of the auditor of Pacific County, Washington, in which the property described in said mortgage is situated, on the 8th day of December, 1910, at 1:15 o'clock P. M. and recorded in Book 30 of mortgage records, at page 31, and was also filed on the same date as a chattel mortgage in the same office but not recorded as such.

IT IS FURTHER AGREED that the Pacific State Bank, petitioner and claimant, and the Raymond Box Company, bankrupt, are corporations organized under the laws of Washington.

IT IS FURTHER AGREED that the value of the real and personal property described in said instrument claimed to be a mortgage is approximately and does not exceed Twenty Thousand (\$20,000) Dollars.

IT IS FURTHER AGREED that subsequent to the stipulation heretofore filed and dated April 24, 1912, the petitioner, the Pacific State Bank, has duly filed its claim for the indebtedness due it as a preferred claim, based upon said instrument claimed by it to constitute a mortgage.

IT IS FURTHER AGREED that the bankrupt is indebted in the sum of about Fourteen Thousand (\$14,000) Dollars, to creditors other than the Pacific State Bank, and that all of said creditors became such subsequent to the execution of said instrument claimed to constitute a mortgage, and prior to the adjudication in bankruptcy, and the following cred-

itors had no actual knowledge of the fact of said alleged mortgage prior to the time the bankrupt became indebted to them, to wit: Raymond Foundry & Machinery Company, Siler Mill Company, Willaha Lumber Co., W. W. D. Wood Company, Pearce Brothers and T. H. Bell. [84]

IT IS FURTHER STIPULATED that at all times prior to the filing of the petition by the Pacific State Bank for leave to foreclose, and at all times since and now the Trustee was and is in the full, actual and manual possession of all of the property of the bankrupt described in the mortgage.

IT IS FURTHER STIPULATED that there shall be incorporated as part of the record and transcript on appeal in addition to this stipulation following papers, to wit: 1st, the petition of the Pacific State Bank for the leave to foreclose, the return of the trustee, the return of certain unsecured creditors and the replications of the bank; 2d, the affidavit of M. H. or Miles H. Leach as to who were stockholders, etc.; 3d, findings and judgment of the Superior Court of the Pacific Company in the case of McKenzie vs. Heath; 4th, the motion of the petitioner of the Pacific State Bank for leave to amend and order permitting amendment; 5th, the stipulation dated July 25th, 1912; 6th, the copy of the mortgage and note of the instrument claimed by the Pacific State Bank to be a mortgage and the note of the Pacific State Bank filed July 26th, 1912; 7th, the proof of claim of the Pacific State Bank; 8th, this stipulation; 9th, the order or judgment of the Court; 10th, the proceedings for the taking of the appeal and the perfec-

tion thereof. It is also agreed that both parties have taken exceptions for all rulings hostile to them.

IT IS AGREED that the record so made up will be sufficient for review and will contain that [85] portion of the record necessary to the hearing in the Circuit Court of Appeals, but this stipulation shall not conclude either of the parties if, in the opinion of such parties it is necessary to cause to be certified as a part of the transcript or subsequent thereto any other portion of the evidence or the record.

Dated this 24th day of August, 1912.

CHAS. E. MILLER,

Attorney for Trustee.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for Pacific State Bank.

WELSH & WELSH,

Attorneys for Unsecured Creditors.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [86]

Order [Making Certain Additional Papers a Part of the Record, etc.].

On the application of the Pacific State Bank for an order making a part of the record various papers, affidavits and other instruments introduced in evidence before the Referee in Bankruptcy and by him transmitted for consideration in connection with the petition for review of the order of the referee in the matter of the petition of the Pacific State Bank for

leave to foreclose its mortgage, said papers, affidavits and other instruments having been heretofore considered by the Court in a determination of the validity of the mortgage claimed by the Pacific State Bank,

IT IS ORDERED that the following papers, in addition to the papers already a part of the record herein, shall be and are hereby made a part of the record in this cause, to wit: The petition of the Pacific State Bank for leave to foreclose its mortgage, the return of the trustee thereto, the answer of certain unsecured creditors thereto, the replication of the Pacific State Bank, the affidavits of the following: F. C. Lewis, and C. W. Reed, I. W. Homan, Ernest F. Rhodes, J. W. Kleeb, Joseph G. Heim, H. W. B. Hewen, Miles H. Leach, dated April 16, 1912, E. E. Case and F. R. Brown, M. E. Riley, Neal Stupp. Also a certified copy of the findings and judgment of the Superior Court of the State of Washington for Pacific County in the cause of Alex McKenzie, administrator of the estate of F. A. McKenzie, deceased, against J. Albert Heath.

Also the stipulation between the attorney for the trustee and the attorneys for the Pacific State Bank, dated July 22, 1912. Also the stipulation between said parties and Welch & Welch, attorneys for unsecured creditors, dated April 24, [87] 1912, and the stipulation between the same parties dated August 24, 1912. Also the copy of the instrument claimed by the Pacific State Bank to constitute a mortgage certified by the Auditor of the Pacific County and filed herein on the 26th day of July, 1912. Also the

proof of claim of the Pacific State Bank filed in the office of the clerk, July 26, 1912. Also the affidavits attached to the return of the trustees, to wit: Exhibit "A," "B," "C," "D," "E," "F," "G," and "H." Any of said instruments not already marked "filed" are directed to be filed by the clerk and so marked.

Dated this 27th day of August, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [88]

**Memorandum Decision In Re Mortgage Owned by
the Pacific State Bank.**

By reference to the papers on file I find that on the 5th day of April, 1912, the referee having charge of the proceedings in this case made an order based upon a petition presented to him by the Pacific State Bank, a corporation of the State of Washington directing the trustee of the bankrupt's estate to show cause on a specified date why said corporation (hereinafter for convenience designated as "The Bank") should not be granted leave to foreclose a mortgage covering real and personal property constituting the manufacturing plant of the bankrupt corporation, alleging the same to be the first mortgage and a prior lien upon all of said property and to join the trustee as a party defendant in such foreclosure suit, in any court having jurisdiction. Responding to said show cause order, the trustee, on the 19th day of April, 1912, made a return in writing opposing the petition

and containing allegations contesting the validity of the mortgage. A large number of creditors of the bankrupt also filed an answer to said petition in opposition to the granting of leave to foreclose said mortgage, traversing the material allegations of the petition and pleading affirmatively their rights as creditors and matters of fact and law constituting grounds for holding the mortgage to be void in law and equity. The Bank filed replications to the return of the trustee and to the answer of the creditors. The controversy as set forth in the pleadings above enumerated was heard by the referee on the 19th day of April, 1912, and thereupon he made an order granting The Bank leave to foreclose said mortgage in the proper court having jurisdiction thereof and to make the trustee a party, and by virtue of that order The Bank [89] claimed the right to institute a foreclosure suit in the Superior Court for the State of Washington. Exceptions were taken to the order granting leave and upon a petition for review of the referee's decision he certified the case to the court. On May 16th, 1912, by a stipulation signed by attorneys representing the trustee, unsecured creditors and The Bank, the following facts were admitted:

“That the petitioner, Pacific State Bank, has not, at any time, filed its claim or any claim for the indebtedness represented by the note and mortgage described in its said petition.

That at the time the said petitioner, Pacific State Bank filed its said petition for leave to foreclose its said mortgage and at the time the

order to show cause thereon was issued the trustee in the above-entitled matter was in the full, actual and manual possession of all of the property of the bankrupt described in said mortgage.

That at the time the said petition was verified, to wit, on March 18, 1912, there was due on the said note the sum of \$22,351.71, with interest thereon from October 1, 1911, at eight per cent per annum, no part of which had been paid, and that the same was long past due and owing; and that the copies of said note and mortgage filed by the petitioner are true copies of the original thereof."

In the administration of insolvent estates through judicial proceedings, for the sake of economy and expedition, it is desirable that a single court should marshal the assets, adjudicate conflicting claims and determine the priorities between competing creditors, lien claimants and all parties asserting rights with respect to the *res* and distribute the funds to the parties according to their rights in order that the administration may be complete and final. Therefore, it is obvious that the proper court to adjudicate all such matters and controversies must be the court which first acquires legal custody of the *res* and jurisdiction of the subject matter involved. 1 *Loveland on Bankruptcy* (4th ed.), p. 107, sec. 31; 2 *Loveland on Bankruptcy* (4th ed.), p. 1039-1040; *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327. By [90] the stipulation above mentioned it appears that this Court, through the trustee in bankruptcy,

did have legal custody of the mortgaged property when The Bank presented its petition to the referee asking leave to foreclose said mortgage, and by the law this Court is vested with full jurisdiction to adjudicate all questions as to the validity of said mortgage and as to preferential claims and to sell the property and apply the proceeds to the payment of the mortgage debt, if it shall be adjudged to be a valid lien upon all or any part of the property, and in that manner to protect the rights of The Bank as effectually as might be done by an ordinary foreclosure proceeding in another court. And to avoid vexatious complications with respect to expenses incidental to the custody and preservation of the mortgaged property, it is for the advantage of all parties to have the estate fully administered in the bankruptcy proceedings. For these reasons I have heretofore made an oral announcement of the determination of the Court to set aside the order made by the referee granting leave to foreclose the mortgage in any other court and at the same time I directed attention of counsel to the fact that The Bank had failed to file its claim as a preferred creditor based upon the mortgage, and requested them to consider the question whether without such claim being filed and without other pleadings the controversy could be properly adjudicated. In response to my suggestion The Bank through its attorneys has filed in this court a verified proof of its claim as a secured creditor, accompanied by a certified copy of the record of the mortgage and a copy of the promissory note secured thereby after exhibiting to the Court the original

note, and by a stipulation signed by the attorney for the trustee and attorney for The Bank the case has been submitted to me for decision of the questions affecting the validity of the mortgage. [91]

The validity of the mortgage is assailed on two grounds, viz.: 1. There is no record evidence of authority conferred by the board of trustees of the mortgagor to encumber this property by a mortgage; 2. The mortgage is void upon its face because the certificate of acknowledgment lacks the essentials of validity prescribed by a statute of this state, to wit: an act entitled: "An Act providing the form and contents of acknowledgments of corporations to instruments executed and acknowledged by corporations." Laws of Wash. 1903, 245.

The mortgagor is a Washington corporation and its powers must be exercised conformably to the laws of this State, and to sustain his contention the trustee of the bankrupt estate relies upon a statute of the State prescribing that: "The powers of corporations must be exercised by a board of not less than two trustees who must be stockholders of the company." Rem. & Ball. Codes of Wash., sec. 3686; Pierce's Code, 1905, sec. 7059, and the statute above cited prescribing the essentials of a valid certificate of acknowledgment by which the execution of a deed or mortgage by a corporation must be authenticated, the statutory requisites being as follows: The officer to whom the acknowledgment is made must certify (a) that the person assuming to execute an instrument as the act and deed of corporation requiring an acknowledgment, must certify that such person is

known to him to be the president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be, of the corporation that executed such instrument; (b) that such officer or agent acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned; (c) and on oath stated that he was authorized to execute said instrument; (d) and that the seal affixed is the *corporate* [92] *board* of trustees as an organized body, the execution of the mortgage was authorized. The mere assent of the members of the board separate and apart is not equivalent to action by the board or the corporation as an entity, and without evidence of such action the Court is not authorized to presume that the corporation did in fact encumber its working plant and all of its substantial assets.

7 Am. & Eng. Enc. of Law (2d ed.), 701;

3 Washburn on Real Property (4th ed.), 262.

The certificate of acknowledgment is of the following tenor:

“State of Washington,
County of Pacific,—ss.

Be it remembered that on this 2nd day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath, as President and the said Miles H. Leach, as

Secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation. Witness my hand and official seal.

[Notarial Seal] H. W. B. HEWEN,
Notary Public Residing at South Bend, Wash-
ington."

This does not meet the requirements of the statute. It is sufficient because it does not certify that the official character of the persons who made the acknowledgment as officers of the corporation was known to the certifying officers, and because it lacks the required declaration *on oath* of said officers *that they were authorized to execute the instrument*, and because it lacks the declaration *on oath* of said officers *that the seal affixed was the seal of the corporation*. These defects are glaring and the Court cannot give effect to the mortgage as a valid [93] seal of said corporation.

The statute of this State governing conveyances of real property specifically provides that all conveyances of real estate or any interest therein and all contracts creating or evidencing any encumbrance

upon real estate shall be by deed. A deed shall be in writing, signed by the party bound thereby and acknowledged by the party making it before some person authorized by the laws of this state to take the acknowledgment of deeds. Rem. & Ball. Code of Wash., sec. 8745-6; Pierce's Code (1905), sec. 4435-6. The special act heretofore cited prescribes the particular form of acknowledgment applicable to instruments executed by corporations.

Instruments not acknowledged as required by these statutes are void. *Forester vs. Reliable Transfer Co.*, 59 Wash. 86.

The mortgage which is the subject of this controversy is dated December 2, 1910, and its validity or invalidity must be adjudged conformably to these statutes enacted in the exercise of legislative power to regulate the conduct of corporations within the State and the mode of conveying titles to property and their observance is necessary in order to maintain confidence in the stability of recorded titles.

The introductory and concluding clauses of the instrument are as follows:

“THIS INDENTURE made this 2nd day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part: * * *

In witness whereof, the said party of the first part has hereunto affixed its corporate seal and

these presents to be effected by its President and Secretary with the authority of the Board of Trustees."

And this is all that appears by the instrument itself or in the case to warrant an inference that by any act of the [94] lien upon the bankrupt estate contrary to the plainly expressed will of the legislature. To do so would be a judicial nullification of a statute, the validity of which has not been questioned. Furthermore a decision giving effect to an instrument creating a lien upon property in this state lacking in formalities prescribed by the statutes of the State, would be in opposition to decisions of the Circuit Court of Appeals for the Ninth Circuit upholding the principle that statutes prescribing the mode of executing instruments required to be recorded as evidence of rights to property in this state, are mandatory and that such instruments lacking the prescribed solemnities are void.

Chilberg vs. Smith, 174 Fed. Rep. 805;

Mills vs. Smith, 177 Fed. Rep. 652;

In re Osborn, 196 Fed. Rep. 257.

It is useless to try to sustain this mortgage by disputing the right of the trustee to contest it. Lacking as it does a sufficient certificate of acknowledgment it is impotent to create a lien, and the trustee holds the title unencumbered by virtue of the bankruptcy law. In re Osborn, 196 Fed. Rep. 257.

Authorities have been cited sustaining the right of a mortgagee in possession of mortgaged property and holding as security for a valid debt against claims of other creditors having no lien and that such

nonlien creditors have no standing to contest the mortgagee's rights, merely because the mortgage was defective or void. In such a case the right to the security is equivalent to the right of a pledgee because based upon actual possession, but in this case the trustee, not The Bank, is in possession.

I find among the papers an affidavit by Mr. Leach, secretary of the bankrupt corporation, affirming the facts omitted in the certificate of acknowledgment of the mortgage and also [95] stating that at the time of the execution of the mortgage, all of the stock of the corporation was owned by himself and the president of the corporation, who joined in execution of the mortgage, and that himself and the president were the only trustees of the corporation at that time. I deem it sufficient to say in regard to this affidavit that it cannot be regarded as a plea of estoppel nor as competent evidence, either to sustain such a plea or to cure the defective certificate of acknowledgment.

For the reasons stated it is my opinion that this mortgage is a void instrument and that the claim of The Bank should be allowed only as an unsecured claim, and the mortgage security rejected.

C. H. HANFORD,

Judge. [96]

[Addenda to Memorandum Decision Re Mortgage.]

It has been made known to me that counsel for The Bank are aggrieved by the brief and somewhat abrupt treatment which the affidavit of Mr. Leach received in the foregoing memorandum, and it is necessary to make a more extended explanation of

my opinion in this case in order to avoid a misunderstanding which might be the basis for unfairly criticising their conduct of the case. The manner in which the case has been prepared and argued convinces me that the work of counsel has been faithfully and intelligently performed, and that nothing has been left undone which might lead me to a different conclusion or decision of the case.

I wish to say further that in my study of the case I did not fail to notice the important facts that the claim of The Bank is for a *bona fide* debt due and owing to it by the bankrupt corporation; that credit was given by The Bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed had been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon; and that the testificandum clause recites that its execution by its president and secretary was authorized by the board of trustees. With these matters in mind the Court must decide the question whether the document itself, aided by a conclusive presumption that it speaks the truth and tested by the rules of law applicable thereto, proves its own validity. I adhere to the opinion intended to be expressed in the memorandum originally filed, that it is invalid and impotent to create a lien. The defects apparent upon an inspection [97] of the document are lack

of authority conferred *by a corporate act* to execute a mortgage and lack of the statutory requirements in the certificate of acknowledgment. These defects are not supplied and cannot be supplied by any pleading or proof, or pleading and proof of the matters stated in Mr. Leach's affidavit. The Court cannot find, by reading the document nor by evidence offered or suggested, that at any time there was a lawfully convened meeting of the board of trustees at which action was taken by the board as an organized body conferring authority to execute a mortgage. I do not mean to affirm that the minutes of a meeting of the board of trustees would be the only competent evidence to prove that such a meeting was held or of the action taken, but to meet the objection urged against the validity of this mortgage on the ground of lack of authority to execute the same, as the document itself does not recite specifically the time and manner of granting authority, some evidence is necessary to prove affirmatively that the authority was conferred by act of the board of trustees as an organized body. The certificate of acknowledgment is insufficient and the defects are not formal but substantial as I have before stated, and this objection to the validity of the instrument cannot be overcome by any evidence because the certificate itself is a substantial part of the mortgage. The making of a certificate is an official act and the facts required to be certified must be certified in accordance with the requirements of law. In this case the certificate is lacking and no substitute for it will meet the exactions of the law. If in place of Mr. Leach's

affidavit the facts stated therein had been formally pleaded as an estoppel, in bar of any attempt to contest the validity of the mortgage, and if the plea had been supported by testimony taken according to the usual course of procedure in introducing [98] evidence in a suit in equity, and if such evidence were uncontradicted or even confirmed by admissions of the adverse party, the relative rights of the parties to this controversy would not, in my opinion, be at all changed.

The issue to be decided is whether the instrument called a mortgage has any virtue as a legal contract creating a valid lien upon the bankrupt's property. Now to elaborate in detail the grounds of my decision so that, if possible, it shall not be misunderstood by anyone, I will say, in addition to what has been said, that there is a right way for corporations to exercise their powers in dealing with property, and no other way is right. When natural persons avail themselves of the supposed advantages of transacting business through the medium of an artificially created person, called a corporation, they should keep in mind the important fact that their rights as individuals with respect to the business conducted by, or the property vested in, the corporation are not merely merged in the artificial person. It must act through its own agents and according to its organic law. If Mr. Heath and Mr. Leach owned the plant of the Raymond Box Company, and conveyed the title and possession of it to a third person named John Smith, it would not be supposed that they could afterwards create a valid lien upon the same prop-

erty by executing a mortgage, and it is the sense of my decision that Mr. Heath and Mr. Leach could not, by their act in executing a mortgage, create a valid lien upon the plant when the title was fully vested in the bankrupt corporation. The right way for a corporation to execute its power to mortgage its property is to have a formal meeting of its board of trustees at such a time and place, and pursuant to such a notice, as will enable all of the members to be present, and at such meeting all or a quorum must be present and act as a body and not [99] as individuals in the adoption of a resolution authorizing the execution of the proposed mortgage, and then the instrument should be written, signed, sealed and acknowledged by officers or agents of the corporation authorized by it to act, and then the instrument should have appended to it the certificate of acknowledgment and sworn statement which the law specifically requires. The formal meeting of the board of trustees should be evidenced by a record kept of the proceedings of the board of trustees and an instrument affecting the title to property should contain a specific reference to the action of the board of trustees conferring authority for its execution. It is for lack of authority to execute the mortgage so conferred and of a certificate of acknowledgment and sworn statement conforming to the requirements of a statute of this State that I hold the mortgage in question to be void, and when I use the word "void" I mean that it has not virtue to affect the legal title of the corporation as a distinct entity. By force and virtue of Section 70 of the Bankruptcy Law, and

Section 47 as amended, the unencumbered legal title of the bankrupt corporation to the property in controversy passed to and became vested in the trustee and that legal title has been reinforced by his actual manual possession of it, therefore, the trustee is not in the situation of a nonlien creditor endeavoring to pick flaws in a mortgage for the purpose of uncovering property subject to execution. With respect to the property he represents the legal owner and all of the unsecured creditors. In that situation the mere equitable rights of The Bank which might be asserted against the bankrupt corporation alone or its stockholders, cannot prevail in this court. On this proposition the decisions of the Circuit Court of Appeals for the Ninth Circuit which has been cited are [100] controlling and conclusive.

C. H. HANFORD,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 31, 1912. E. W. Engle, Clerk. R. W. Jamieson, Deputy." [101]

[Decree.]

This cause came on to be heard at this term upon the exceptions made by the Trustee to the order of the referee in bankruptcy and the petition for review of the order of the referee in bankruptcy allowing foreclosure of the mortgage of the Pacific State Bank in the State court, and upon the subsequent stipulation of the parties that the Court should determine the validity of said mortgage, and upon the proofs made and the agreed statement of facts filed in this court

on the 27th day of August, 1912; the trustee appearing by Charles E. Miller, his attorney; The Pacific State Bank appearing by H. W. B. Hewen and Hayden & Langhorne, its attorneys; the Court having examined the evidence adduced before the referee in bankruptcy, and having also examined the agreed statement of facts, and being now duly advised in the premises, it is

ORDERED, ADJUDGED and DECREED that leave to foreclose said mortgage in the State court be and it is denied, to which ruling attorneys for the Bank except and their exception is allowed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that said mortgage be and it is adjudged to be invalid and of no effect for want of a proper acknowledgment, and for lack of authority in the president and secretary to execute the same, to which judgment the attorneys for the Bank except and their exception is allowed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the claim of the Pacific State Bank be allowed as a general claim, and its claim for preference based upon its alleged [102] mortgage be and it is rejected, and so far as said claim for a preference is rejected by this order, the attorneys for the Bank except and their exception is allowed.

Dated this 20th day of September, 1912.

EDWARD E. CUSHMAN,
Judge.

O. K.—CHAS. E. MILLER,
Attorney for Trustee.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [103]

Assignment of Errors.

Comes now the Pacific State Bank, petitioner herein, and files the following assignment of errors upon which it will rely upon the prosecution of its appeal from the order and decree made by this honorable Court on the 20th day of September, 1912, to wit:

1. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, is invalid and of no effect.

2. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid for want of a proper acknowledgment, and erred in holding and adjudging that the said mortgage was not properly acknowledged.

3. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid and of no effect for lack of authority in the President and Secretary to execute the same, and in holding and adjudging that the President and Secretary of the Raymond Box Company did not have authority to execute said mortgage.

4. The Court erred in adjudging that the claim of the Pacific State Bank for preference, based upon its mortgage, be rejected.

5. The Court erred in entering its order of September 20, 1912, in favor of the trustee in bankruptcy and against the petitioner.

In order that the foregoing assignment of errors may be and appear of record, the petitioner, the Pacific State Bank presents the same to the Court and prays that such disposition may be made thereof, as is in accordance with [104] the laws and statutes of the United States in such cases made and provided, all of which is respectfully submitted.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for the Pacific State Bank, Petitioner.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [105]

*In the District Court of the United States, for the
Western District of Washington, Southern Division.*

No. 1054.

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Petition for Appeal.

To the Honorable E. E. CUSHMAN, Judge of the
Above-named Court, Presiding Therein:

The Pacific State Bank, petitioner herein, conceiving itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled court, under date of September 20th, 1912, wherein and whereby, among other things, it was and is ordered and directed that the petition of the Pacific State Bank for leave to foreclose its mortgage in the State court be denied, and wherein the mort-

gage of the Pacific State Bank is adjudged to be invalid, and of no effect for want of proper acknowledgment, and for lack of authority in the president and secretary to execute the same, and wherein the claim of the Pacific State Bank for a preference, based upon its mortgage, be and is rejected, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from said order and decree, and particularly from that part thereof which adjudges the Pacific State Bank's mortgage to be invalid and of no effect, and which adjudges the said mortgage invalid for want of a proper acknowledgment and for lack of authority in the president and secretary to execute the same, and also [106] from that portion of said order and decree which rejects the claim of the Pacific State Bank, based upon its mortgage, for a preference for the reasons set forth in the assignments of error which is filed herewith, and it prays that its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of September, 1912.

H. W. B. HEWEN,

HAYDEN & LANGHORNE,

Attorneys for the Pacific State Bank.

Order [Granting Petition on Appeal].

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Five Hundred no/100 (\$500.00) Dollars.

Dated this 20th day of September, 1912.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [107]

*In the District Court of the United States, for the
Western District of Washington, Southern
Division.*

No. 1054.

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That we, The Pacific State Bank, a corporation organized under the laws of Washington, with its principal place of business at South Bend, Pacific County, Washington, as principal, and American Bonding Company of Baltimore, Md., as surety, are held and firmly bound unto A. S. Coats, trustee in bankruptcy of the Raymond Box Company, bankrupt, and Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Com-

pany, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clerk, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, and each of [108] them in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said A. S. Coats, as trustee aforesaid, and Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, their attorneys or assigns, for which payment well and truly to be made we bind

ourselves, our representatives, successors and assigns jointly and severally firmly by these presents.

Sealed with our seal and dated this 20th day of September, 1912.

WHEREAS, at a session of the District Court of the United States, for the Western District of Washington, Southern Division, in a suit in bankruptcy pending in said court, to wit: In the Matter of the Raymond Box Company, Bankrupt, an order and decree was rendered on the 20th day of September, 1912, wherein and whereby said Court did adjudge a certain mortgage described in the petition of the Pacific State Bank to be invalid and of no effect for want of a proper acknowledgment and for lack of authority in the [109] president and secretary to execute the same, and the claim of the Pacific State Bank for a preference, based upon said mortgage, was rejected, and the Pacific State Bank having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said decree and order, and a citation directed to the said A. S. Coats, Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas,

Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, is about to be issued citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

NOW, THEREFORE, the condition of the above obligation is such that if the said Pacific State Bank shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be [110] void, otherwise to remain in full force and effect.

PACIFIC STATE BANK,

By JOSEPH G. HEIM, Pres., Principal.

AMERICAN BONDING COMPANY

OF BALTIMORE, MD.

By JOSEPH G. HEIM,

Local Vice-Pres., Surety.

[Seal]

Attest: H. W. B. HEWEN,

Local Secretary.

Sufficiency of sureties on the foregoing bond approved this 20th day of September, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [111]

**Certificate [of Clerk U. S. District Court to Record,
etc.].**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of In the Matter of Raymond Box Company, Bankrupt, No. 1054, as required by the stipulation of counsel filed in said cause, as the originals thereof appear on file in said court, at the City of Tacoma, in said District.

I do further certify that I hereto attach and herewith transmit the original Citation, with acknowledgment of service thereon;

And I further certify the cost of preparing and certifying the foregoing record to be the sum of Forty-six Dollars and ten cents (\$46.10), which sum has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Tacoma, in said District, this tenth day of October, A. D. 1912.

[Seal]

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy Clerk. [112]

[Endorsed]: No. 2193. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific State Bank, a Corporation, Appellant, vs. A. S. Coats, as Trustee in Bankruptcy of Raymond Box Company, a Corporation, Bankrupt, et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Western Division.

Received October 14, 1912.

F. D. MONCKTON,
Clerk.

Filed October 16, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 1054.

In the Matter of the RAYMOND BOX COMPANY,
Bankrupt.

Citation.

United States of America,—ss.

The President of the United States to A. S. Coats,
as Trustee in Bankruptcy of Raymond Box
Company, and to Pacific Transportation Com-
pany, Raymond Transfer & Cold Storage
Company, Cram Lumber Company, Raymond

Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Lumber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owen, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed. Leacock:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the clerk of the District Court of the United States, for the Western District of Washington, Southern Division, wherein the Pacific State Bank is plaintiff and you are defendants in error in a certain matter entitled "In the Matter of the Raymond Box Company, Bankrupt," to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington, at Tacoma, in said District, this 23d day of September, A. D. 1912, as of September 20, 1912.

[Seal]

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington, Residing at Tacoma, in Said District.

Service of the foregoing citation is hereby accepted this 25th day of September, 1912.

CHAS. E. MILLER,

Attorney for A. S. Coats, Trustee in Bankruptcy.

WELSH & WELSH,

Attorney for Pacific Transportation Co., Raymond Transfer & Cold Storage Co., Cram Lbr. Co., Raymond Foundry & Machine Co., Bell Bros. Hardware Co., Siler Mill Co., Willapa Lbr. Co., W. W. Wood Co., Pierce Bros., J. E. Gardner, Standard Tow Boat Co., Case Shingle & Lbr. Co., Quinault Lbr. Co., Lebam Mill & Lbr. Co., Fern Creek Lbr. Co., Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owen, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed. Leacock.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Raymond Box Company, Bankrupt. Citation. Filed U. S. District Court, Western District of Washington. Sep. 28, 1912. Frank L. Crosby, Clerk. E. C. Ellington, Deputy.

No. 2193. United States Circuit Court of Appeals for the Ninth Circuit. Received Oct. 12, 1912. F. D. Monckton, Clerk. Filed Oct. 16, 1912. F. D. Monckton, Clerk.



IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a corporation,

Appellant,

vs.

A. S. COATES, as trustee in Bankruptcy
of RAYMOND BOX COMPANY, a corporation, bankrupt,

Appellee.

No.....

STATEMENT OF CASE.

The questions before this court arose out of the application of the Pacific State Bank, appellant, addressed to the bankruptcy court below, for leave to foreclose its mortgage. As appears by an inspection of the petition, the application of The Pacific State Bank was in the alternate, first asking leave to foreclose in the State court, but if the court should be of the opinion that such foreclosure should be in the bankruptcy court, then asking that the amount of the indebtedness be ascertained, its mortgage adjudged a valid mortgage lien, and the property sold for the satisfaction thereof. (See Record, pages 2 to 17).

The referee in bankruptcy granted leave to foreclose the mortgage in the State court without considering any question of validity. The matter was taken to the District Court for review and Judge

Hanford announced orally that he would reverse the decision of the referee, but would not determine any question of the validity of the mortgage unless it would be agreed by the parties he should do so. The bank then filed its claim as a preferred claim and joined with the trustee in bankruptcy in a stipulation that the Court should determine the validity of the mortgage. Thereafter a decree was entered by the Court denying leave to foreclose in the State Court, and adjudging that the mortgage was invalid and of no effect for want of proper acknowledgment and for lack of authority in the president and secretary to execute the same, but allowing the claim of the Pacific State Bank as a general claim. (Record, page 106).

There is no controversy of fact involved in this appeal. Both by the pleadings and by the stipulation of the parties (Record, page 86) every question of fact is fully agreed upon and the decision of Judge Hanford, and the order entered by Judge Cushman pursuant thereto, were in the light of these agreed facts.

The indebtedness from the bankrupt to the petitioner amounts to \$22,351.71, with interest from October 1, 1911, at eight per cent per annum. To secure that indebtedness, an instrument in form set out on pages 18 to 24 of the record, was executed in the name of the Raymond Box Company by J. A. Heath, its president, attested by Miles H. Leach, its secretary, with the genuine corporate seal of the Raymond Box Company attached. (See answers, Record, pages 29 and 46. Stipulation, 86). This

instrument was verified as required by statute with relation to chattel mortgages, and it was acknowledged in the form set out on pages 22 and 23 of the record, and hereinafter set out.

The form of the acknowledgment (if not taken in connection with the verification) did not contain any oath. Heath, the president, and Leach, the secretary, respectively, held such offices and were the sole trustees and the sole stockholders of the corporation. (Affidavit of Leach, Record, page 68). Prior to the execution of this instrument, Heath, the president, had agreed to sell an undivided interest in a portion of his stock, under an agreement whereby he was to retain the voting power (Record, page 82), but according to a judgment of the Superior Court of Pacific County Heath had, prior to the execution of the mortgage herein, converted this stock to his own use, and judgment was rendered against him for its value in the sum of \$2644.00. (Record, pages 69 to 75).

There is no controversy in the record that, excepting as just above stated, Heath and Leach owned all of the stock of the company and were the only trustees and officers thereof.

The lower Court was of the opinion that the mortgage was invalid, first because it was not authorized, according to the record, by act of the Board of Trustees as an organized body, and second, because the acknowledgment was insufficient under the Statute. (Opns. Record, 92 and following pages. See particularly page 105).

It is undisputed that all of the creditors of the

bankrupt other than the Pacific State Bank, have become such subsequent to the date of the mortgage. (Record, 34 and 88).

ASSIGNMENT OF ERRORS.

1. The Court erred in adjudging that the mortgage of the petitioner, The Pacific State Bank, is invalid and of no effect.

2. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid for want of a proper acknowledgment, and erred in holding and adjudging that the said mortgage was not properly acknowledged.

3. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid and of no effect for lack of authority in the President and Secretary to execute the same, and in holding and adjudging that the President and Secretary of the Raymond Box Company did not have authority to execute said mortgage.

4. The Court erred in adjudging that the claim of the Pacific State Bank for preference, based upon its mortgage, be rejected.

5. The Court erred in entering its order of September 20, 1912, in favor of the trustee in bankruptcy and against the petitioner.

ARGUMENT.

The opinion of the trial court and the judgment show that there were two grounds on which the mortgage was held invalid; first, that there was a lack of authority in the officers who executed the instrument on behalf of the corporation; and second, that the

acknowledgment was fatally defective, and therefore the mortgage was invalid.

The assignments of error must almost necessarily be discussed together. For the purpose of making clear the argument to sustain our position, we propose to discuss the questions arising under the following heads, to-wit:

I.

ALLEGED LACK OF AUTHORITY.

It is undisputed that the officers signing on behalf of the corporation are respectively president and secretary, and the only trustees of the company, and that the seal attached is the corporate seal. (Record, pages 30, 46, 82). Also that the instrument itself recites that the act of the officers is by authority of the Board of Trustees. (Record, pages 23, 87).

It is also undisputed that the two men who signed as president and secretary are all of the stockholders of record in the company (Record, page 68); and that the mortgage was made to secure a bona fide debt. (Record, page 82 and page 103).

Under these circumstances we are inclined to venture the assertion that there is no reported case which holds that an instrument of this kind is invalid for lack of corporate authority.

In *Cook on Corporations*, 6th Ed., Sec. 722, it is stated:

“When proof is given that an instrument was signed by the corporate officers, and that the seal attached is the corporate seal, the courts will presume that the seal

was affixed by proper authority, and that the execution was duly authorized, but this presumption may be overthrown by proof that the seal was affixed without proper authority from the board of directors or some other duly authorized corporate agency.”

This statement we believe to be elementary law.

In the case of *Milton vs. Crawford*, 65 Wash., 152, the following language is used:

“It is claimed that there is nothing in the abstract to show that Pratt and Rickard, who executed the deed to Stuht, Crawford’s grantor, as president and secretary of the corporation, were authorized to do so either by resolution of the trustees or by the by-laws of the corporation. The officers who executed the deed as the act of the corporation were the appropriate officers. The instrument was authenticated by the seal of the corporation. Under such circumstances, the law presumes that the conveyance was authorized, and it was not necessary to produce further evidence to make a prima facie showing of authority.

“ ‘A very extensive principle in the law of corporations applicable to every kind of written contract executed ostensibly by the corporation, and to every kind of act done by its officers and agents in its behalf, is that, where the officer or agent is the ap-

propriate officer or agent to execute a contract, or to do an act of a particular kind, in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce *evidence* of such authority from the records of the corporation. Under the operation of this principle, a deed or mortgage, purporting to have been executed by a corporation, which is signed and acknowledged in its behalf by its president and secretary, will be presumed to have been executed by its authority. So proof of the signatures of the officers of a corporation to a release *under seal* purporting to have been executed by the corporation, is *prima facie* evidence of its due execution. So where an undertaking on appeal, purporting to have been executed by the corporation as *surety* was signed by its second vice-president and its assistant secretary, with the corporate *seal* affixed, the authority of the officers to execute the instrument was presumed in absence of evidence to the contrary. 4 *Thompson Corp.* (1st Ed.) Sec. 5029.'

"See also: *Gorder vs. Plattsmouth Canning Co.*, 36 Neb., 548; 54 N. W., 830; *Whitney vs. Union Trust Co.*, 65 N. Y., 576; *Hutchins vs. Byrnes*, 9 Gray, 367; *Murphy vs. Welch*, 128 Mass., 489; *Hamilton vs. McLaughlin*, 145 Mass., 20; 12 N. E., 424; *Morris vs. Keil*, 20 Minn., 531; *Yanish vs. Pioneer Fuel Co.*, 64 Minn., 175; 66 N. W., 198;

Watkins vs. Glas, 5 Cal. App., 68; 89 Pac., 840.”

See also *Clark & Marshall on Corporations*, Vol. 4, page 212.

By a long line of decisions, the Supreme Court of the State of Washington has followed the general rule stated in the text books cited above.

The result of the cases in this state, as well as elsewhere, is that wherever the corporation has received the benefit of a transaction, or wherever it has permitted its officers generally to execute instruments, whatever they may be, or to transact business without specific authority from the board, or wherever all of the stockholders of the corporation have knowledge of the transaction and have not seasonably objected, the company itself is estopped to set up the invalidity of the act.

Roy vs. Scott, 11 Wash., 399.

Dexter-Horton Co., vs. Long, 2 Wash., 435.

Leslie vs. Wilshire, 6 Wash., 282.

Kirwin vs. Washington Match Co., 37 Wash., 285.

West Seattle Land & Imp. Co., vs. Novelty Mill Co., 31 Wash., 435.

Atlantic Trust Co. vs. Behrend, 15 Wash., 466.

Parker vs. Hill, 68 Wash., (op.) 146.

In the light of these cases, it is illuminative to read the following taken from the supplemental opinion of the trial judge:

“In my study of the case I did not fail to notice the important fact that the

claim of the bank is for a bona fide debt, due and owing to it by the bankrupt corporation; that credit was given by the bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed had been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon; and that the testificandum clause recites that its execution by its president and secretary was authorized by the Board of Trustees."

The affidavit of Leach (Transcript, page 68) shows that the men who executed the instrument were not only the president and secretary, respectively, but were the sole trustees and sole stockholders of the company making the mortgage. Reference will doubtless be made by the appellees to the finding of facts, conclusions and judgment in the MacKenzie case (Record, pages 69 and 73), and we deem it proper briefly to call the attention of the court to those findings and the judgment predicated thereon. In the first place, it will be noted that the Raymond Box Company was not a party to or bound by the judgment, and there is nothing in the findings or judgment which disputes the affidavit of Mr. Leach, showing that the only stockholders of record were

Leach and Heath. On the contrary, the findings show that Heath was to retain the voting power of the stock. The most that the findings and judgment referred to show is that Heath made an agreement to sell a part of his stock and breached his contract and converted the stock to his own use, and MacKenzie's decedent became entitled to damages for the breach of the contract, and, in fact, was awarded judgment therefor. It will be noted that MacKenzie was not awarded the stock, or any interest therein, *but was awarded a judgment because his decedent did not get what he contracted to get.* It is too clear for serious argument that MacKenzie's decedent was not entitled to any of the rights of a stockholder. Had there been a stockholder's meeting to pass upon the mortgage in question, who would have appeared to represent the stock which stood in the name of Heath? Obviously, Heath would have appeared. It may be true that Heath had not acquired or retained his stock honestly, but the company knew nothing about that. The company only knew Mr. Heath. It did not know MacKenzie's decedent. Even if Heath had not breached his contract, yet he was to have his voting power. Therefore, Heath would have voted. But while he did not vote, so far as the record shows, upon this question, yet under the authorities from the beginning of corporation law down to the present time and in all the states, including the State of Washington, where this corporation is organized and exists and where the property is located, the Heath stock was concluded on the principle of estoppel, by

the action of Heath in participating in the execution of the mortgage and the expenditure of the money secured thereby.

If it is true, under the facts found by the trial judge and admitted by all parties, that an instrument executed by the sole officers, sole trustees and sole stockholders of the corporation is invalid because the gentlemen who held these various positions did not pass a formal resolution, then we are led to conclude that the administration of the law has reached such a point of technicality that business men should never take any step, except under the advice, direction and personal knowledge of a corporation lawyer. The opinion of the trial judge in its last analysis on this branch of the case holds that the board of trustees must not only meet as a board, but they must meet formally and not informally, because the record in this case shows in a convincing manner that the board did, in point of fact, meet and did resolve to execute, though perhaps informally, and did execute the instrument in question. The certificate of the notary public made under his notarial seal shows that the president and the secretary executed and acknowledged it. The affidavit of the president and secretary is one affidavit, not two affidavits, and it would be strange construction for the court to presume, in order to destroy the validity of the instrument, that these things were done separately and not together, and unless they were done separately the board must have been in session as a board.

It is too well settled to require any authority,

or more than a suggestion, that the minutes of the meeting of the board of trustees or other body are not the only evidence of the action of the board, and we believe that even if the highly technical construction of the requirements for valid corporate action adopted by the trial judge should be sustained, yet the evidence in this case shows enough to create the irresistible presumption that a corporate meeting was in fact held.

The rule adopted by the trial judge in this respect is opposed to what every court knows, as a matter of common knowledge, is the well nigh universal practice of small corporations doing business in this country. It is frequently stated in text books and in opinions of courts, and in the discussion of economic questions by students of such questions, that the growth of small business corporations in this country, which has so characterized the latter years of the development of business in the country, is accounted for by the great convenience of so doing business. If it is true that two individuals holding all of the stock, constituting the whole board of trustees and holding all the offices of the corporation cannot bind the corporation without formally calling a meeting to order, formally making a motion, formally adopting it and formally placing it upon the minutes, then the convenience supposed to be one of the strong characteristics of doing business through the medium of a corporation is a myth. Instead of a convenience, it is a pitfall, and a trap to catch the unwary, and if the formalities thus required are insisted upon, it is the very antithesis of

convenience; it is a cumbersome, unwieldy, insecure and slow method of transacting the business affairs of life.

Livieratos vs. Commonwealth, etc., Co., 57 Wash., (op.) 379-80.

II.

ALLEGED DEFECTIVE ACKNOWLEDGMENT.

(a) *Assuming that the acknowledgment was defective, the trustee in bankruptcy who represented only creditors who became such subsequent to the date of the mortgage, could not object to its validity either as a real or a chattel mortgage.*

The trial court held that the mortgage, even if authorized, was invalid because not acknowledged in accordance with the statute. The alleged invalidity consists in the failure of the notary to certify that the officers were such officers and under oath stated that they were authorized to execute the instrument and that the seal affixed was the seal of the corporation. (Record, page 98). We think it best to assume first, that the acknowledgment was irregular, and to discuss the question whether so assuming, the trustee in bankruptcy representing only subsequent creditors can raise the question, and thereafter to discuss the terms of the acknowledgment itself.

Section 47a of the Federal Bankruptcy Statutes as amended by 1910, provides that:

“Such trustee, as to all property in the custody or coming into the custody of the

bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.”

It is settled that a trustee in bankruptcy has the rights and only the rights which the creditors whom he represents would have had, had not bankruptcy intervened, and had the creditors reduced their claims to judgment.

In re Bazemore, 189 Fed., 236.

Chilberg vs. Smith, 174 Fed., 806.

In re Nelson, 191 Fed., 233.

It is clear that Section 47a, set out above, was not intended to create new rights in creditors, or extend rights, but in legal effect was to preserve the rights that creditors might have exercised against the bankrupt, had not bankruptcy proceedings intervened. If it is true that had the company not become bankrupt and had the existing creditors reduced their claims to judgment, the judgment would still be inferior and subject to the mortgage of the appellant, then it is true that the trustee in bankruptcy who only represents the creditors has no better position.

The statutes of this state regarding acknowledg-

ments so far as applicable to this case are found in the following:

(*Rem. & Bal. Code*, Sec. 8745).

“All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed.”

(*Rem. & Bal. Code*, Sec. 8746).

“A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds.”

(*Rem. & Bal. Code*, Sec. 8759).

“The person or officer taking such acknowledgment shall certify the same by a certificate written on or annexed to said mortgage, deed or instrument, which certificate shall be under his official seal, if any he has, and such certificate shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor or principal, before him as such officer, with the date of such acknowledgment.”

(*Rem. and Bal. Code*, Sec. 8761).

“A certificate of acknowledgment, substantially in the following form shall be sufficient:

State of Washington, }
County of..... } ss.

I (here give name of officer and official title) do hereby certify that on this..... day of....., 18..., personally appeared before me (name of grantor, and if acknowledged by wife, her name, and add “his wife”), to me known to be the individual or individuals described in and who executed the within instrument, and acknowledged that he (she or they) signed and sealed the same as his (her or their) free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal
this.....day of.....A. D. 18....

.....

(Signature of officer).”

(*Rem. & Bal. Code*, Sec. 8761½).

“Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall, be sufficient:

State of..... }
County of..... } ss.

On this.....day ofA. D...., before me personally appeared..... to me known to be the (President, Vice-President, Secretary, Treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the

within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

.....
(Signature and title of officer)."

The mortgage, the validity of which is here in question, covers both real and chattel property, though consideration of that fact does not seem to have been given by the trial court. A reference to the statutes of Washington shows that different questions arise in determining its validity as a chattel mortgage from the questions which arise in determining its validity as a real mortgage. Some of the questions, however, are the same, and so far as they can be discussed together, we propose to so discuss them. The statute providing for the acknowledgment and record of chattel mortgages is as follows:

(*Rem. & Bal. Code*, Sec. 3660).

"A mortgage of personal property is void as against *creditors of the mortgagor or subsequent purchasers and encumbrancers* of the property for value and in good faith

unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property.”

The statute providing for the recording of deeds, mortgages, etc., is as follows:

(*Rem. & Bal. Code*, Sec. 8781).

“All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world.”

Referring to *Rem. & Bal. Code*, Sec. 3660, as to chattel mortgages, the court will note that the mortgage is not void generally, but only as against creditors, subsequent purchasers, and encumbrancers of the property for value and in good faith. *There are no subsequent purchasers or encumbrancers in this case*, and the mortgage, if void as a chattel mortgage, is so only as against creditors. The record shows without dispute that all of the creditors became such after the execution and recording of the mortgage now in question. If the mortgage is invalid as a chattel mortgage at all, it must be as against these subsequent creditors. But the Supreme

Court of the State of Washington has twice held that the language of section 3660 refers only to persons *who were creditors at the time of the execution of the mortgage and does not refer to subsequent creditors*. See *Roy vs. Scott*, 11 Wash., 399, where the court uses this language:

“The word ‘subsequent’ relates not to creditors, but to purchasers and encumbrancers. As between mortgagor and mortgagee the instrument is valid and binding as a mortgage without the affidavit, and McNaught, being at that time a mere stranger to the property and having no interest in it, cannot invoke the aid of the statute, which favors a class to which he does not belong.”

McNaught was a subsequent creditor. The mortgage was also held valid as to Johnson, a subsequent encumbrancer.

See also *Urquhart vs. Cross*, 60 Wash., 249.

It is beyond doubt the law of this state, as determined by its highest court, that the statute requiring the acknowledgment of a chattel mortgage and an affidavit of good faith invalidates the mortgage for want of compliance therewith *only in favor of creditors who were such at the time of the giving of the mortgage*. As there are no such creditors here, we think the mortgage must be sustained as a chattel mortgage.

Section 8781, *Rem. & Bal. Code*, taken in connection with Section 8746, *Rem. & Bal. Code*, makes

real estate mortgages valid *as to bona fide purchasers* when they have been acknowledged and recorded. We think it clear that the effect of the statutes, so far as they relate to mortgages of real property is that they are valid as to all *except* bona fide purchasers when they are executed and delivered whether they are acknowledged or recorded or not. It is free of doubt that a deed or mortgage not acknowledged, or defectively acknowledged, in this state is operative against the grantor and his heirs and those claiming under him: .

Edson vs. Knox, 8 Wash., 642.

Carson vs. Thompson, 10 Wash., 295.

Matson vs. Johnson, 48 Wash., 256.

Little vs. Gibb, 57 Wash., 92.

It is also clear under our statutes that judgment creditors have liens only on the actual interest of the judgment debtor, and on purchasing at their own sales are not *bona fide* purchasers.

Dawson vs. McCarty, 21 Wash., 314.

Woodhurst vs. Cramer, 29 Wash., 48.

Book vs. Willey, 8 Wash., 267.

Matson vs. Johnson, 48 Wash., 256.

Hacker vs. White, 22 Wash., 415.

Am. Savings & Trust Co. vs. Helgeson, 64 Wash., 54, Op. 64; 67 Wash., 575-6-7.

In the last cited case the Supreme Court says:

“A little consideration makes it equally plain that the appellant Helgesen stands in no better position than the Ericksons. He claimed under a judgment lien. He was an

execution creditor purchasing at his own sale. Under the established rule in this state, he was not a bona fide purchaser. He took no greater rights than the execution debtor had. His judgment was a lien upon the real, not the apparent interest of the debtor.”

In the case of *Dawson vs. McCarty*, supra, and *Hacker vs. White*, 22 Wash., 415, it is held that an unrecorded mortgage or deed is entitled to priority over a subsequent judgment.

In the case of *Woodhurst vs. Cramer*, supra, it is held that where a mortgage has been formally released of record though not actually paid, such mortgage is entitled to priority over a subsequent judgment.

Since the trustee in bankruptcy takes only the rights which the creditors whom he represents would have had, had not bankruptcy intervened, and since it appears that this mortgage so far as it is a real estate mortgage would prevail in the state courts, even if it were not acknowledged and not recorded, it seems clear that the trustee's rights are subsequent and inferior to the rights of the mortgagee.

(b) *The policy of the statutes of this state and of the courts is liberal with the view to sustaining the intent of the parties and in line therewith the courts consider the entire instrument and all its recitations in order to determine its validity.*

The policy of the statutes of this state from the formation of the state down to this time has been

towards liberality in requirement of acknowledgments and in the execution of instruments generally. This is illustrated not only by various curative statutes, but by Section 8784, *Rem. & Bal. Code*, as follows:

“Every instrument in writing purporting to convey or encumber real property, which has been recorded in the proper auditor’s office, although such instrument may not have been executed and acknowledged in accordance with the law in force at the time of its execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged and recorded in accordance with the laws regulating the execution, acknowledgment, and recording of such instrument then in force.”

See also *Rem. & Bal. Code*, 8757, 8764.

The construction of the statutes of this state by the Supreme Court has uniformly been in accord with the liberal policy of the statutes themselves. In the case of *Bloomington vs. Weil*, 29 Wash., 634, a foreign acknowledgment taken without an official seal and without a certificate of a court of record was upheld. The court held that there was a proper acknowledgment, but a defective certification, and that such fact did not affect its operative force, at least in equity, as against the grantor or one who is not a bona fide purchaser.

In the case of *Carson vs. Thompson*, 10 Wash.,

295, the Supreme Court, in sustaining a deed improperly witnessed, used this language:

“It is evident therefrom that the settled policy of the law was to render valid and give force and effect to all conveyances voluntarily and in good faith signed by the grantors, and not to render such deeds ineffectual in consequence of an informality or defect as to the proof of their execution, and such purpose has been further recognized and continued by subsequent legislative acts. It is evidence that the signature of the grantor was regarded as the important and essential thing. An acknowledgment of an instrument is but a manner or form of attesting its execution. The requirement of witnesses is but another, although additional form of attesting it.”

The mortgage in controversy was executed in the State of Washington and related to Washington property. The corporation making the mortgage is a Washington corporation. The bankruptcy proceeding is in the Federal Court for the Western District of Washington. Bearing always in mind that the bankruptcy statute is not intended to give new rights, but is only a method of winding up the assets of the corporation which has become insolvent in such manner as to preserve the rights of all parties, and that the question in every case is what rights would the creditors represented by the Trustee in bankruptcy have in the state courts, we contend that from the policy of the statutes and of

the courts of this state the rights under appellant's mortgage are property rights which the Federal Court should respect, and if from the foregoing the court is of the opinion that in the Supreme Court of the State of Washington the appellant's mortgage would be upheld, we are entitled upon that ground alone to have the mortgage upheld in this court.

The instrument under consideration begins as follows:

“THIS INDENTURE, made this 2nd day of December, 1910, between the Raymond Box Company, a corporation organized and existing under the laws of the State of Washington, party of the first part, and the Pacific State Bank, also a corporation, organized and existing under the laws of the State of Washington, party of the second part.”

(Record, page 18).

The witnessing clause of the mortgage and the signatures, acknowledgment, and affidavit of good faith are in the following form:

“IN WITNESS WHEREOF, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees.

RAYMOND BOX COMPANY,

By J. A. HEATH, President.

Attest:

MILES H. LEACH, Secetary.

(Seal of the Corporation.)

STATE OF WASHINGTON, }
County of Pacific. } ss.

Be it remembered that on this 2nd day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath as President and the said Miles H. Leach, as Secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name, together with his own name, freely and voluntarily, as his free act and deed, and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation, had signed the above instrument as secretary of said corporation as his free and voluntary act and deed and the free and voluntary act and deed of the said corporation.

WITNESS my hand and official seal.

H. W. B. HEWEN,

Notary Public, residing at South Bend,
Washington.

(Notarial Seal)

AFFIDAVIT.

STATE OF WASHINGTON, }
County of Pacific. } ss.

WE, J. A. HEATH and MILES H. LEACH,
President and Secretary respectively of the
Raymond Box Company, a corporation,
the above named mortgagor, after being
duly sworn on oath, say that the foregoing
mortgage is made in good faith and without
any desire to hinder, delay or defraud
creditors.

MILES H. LEACH.

J. A. HEATH,

Sworn to and subscribed before me this
2nd day of December, 1910.

H. W. B. HEWEN,

Notary Public residing at South Bend,
Washington.

(Notarial Seal).”

(Record, pages 18 to 24 inc.)

It is our contention that in determining the
validity of the mortgage the entire instrument should
be taken into consideration. From all of these re-
citals, it appears that the corporate seal was attached
to the instrument and executed by the President and
Secretary with the authority of the Board of Trus-
tees; (see witnessing clause), that Heath and
Leach, President and Secretary respectively, ac-
knowledged said instrument as President and Sec-
retary, as their free and voluntary deed and the free
act and deed of the corporation, and that the mort-

gage was made in good faith without any design to hinder, delay or defraud creditors.

The case of *Deseret National Bank vs. Kidman*, 71 Pac., 873, was a case where it was claimed that the mortgage was insufficiently acknowledged because the certificate of acknowledgment did not state that the person who executed the mortgage was the same person who acknowledged its execution, but the Supreme Court of Idaho used this language:

“In the case at bar, looking at the affidavit attached to the mortgage, immediately preceding the acknowledgment, we find from the jurat that the affidavit was subscribed and sworn to before the same notary public who took the acknowledgment of the mortgage. This certificate, read with this affidavit, clearly shows that the party who executed the mortgage was the same person who acknowledged the execution of the same.”

Another instance of aiding the acknowledgment by looking at the other portions of the instrument is found in the opinion of Mr. Justice Field in the case of *Carpenter vs. Dexter*, 8 Wallace, 513-27; 19 L. Ed., 426, quoted from in the case last cited, where Mr. Justice Field says:

“The law of Illinois in force in 1847 upon the manner of taking acknowledgments, provides that no officer shall take the acknowledgment of any person unless such person ‘shall be personally known to him to

be the real person who (executed the deed) and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a creditable witness,' and such personal knowledge or proof shall be stated in the certificate. Looking now to the deed itself, we find that the attestation clause states that it was 'signed, sealed and delivered,' in the presence of the subscribing witnesses. One of these witnesses was the Justice of Peace before whom the acknowledgement was taken; and he states in his certificate, following immediately after the attestation clause, that the 'above named William T. Davenport, who has signed, sealed and delivered the above instrument of writing, personally appeared' before him and acknowledged the same to be his free act and deed. Read thus with the deed the certificate amounts to this: That the grantor personally appeared before the officer, and in his presence, signed, sealed and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment."

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an intent to acknowledge. *Cook on Corporations*, 6th Ed., 722, and cases cited.

We insist that even if the form of acknowledgment set out in the statute is exclusive, the acknowledgment with the remainder of the instrument is a substantial compliance therewith, and the statute, by its terms, only requires a substantial compliance,

(c) *There is no actual irregularity in the acknowledgment.*

We contend, however, that the statutes of the state, so far as they prescribe the contents of an acknowledgment have been literally complied with. The only statute really prescribing what an acknowledgment *shall* contain is *Rem. & Bal. Code*, Sec. 8759, as follows:

“The person or officer taking such acknowledgment shall certify the same by a certificate written on or annexed to said mortgage, deed, or instrument, which certificate shall be under his official seal, if any he has, and such certificate shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor or principal before him as such officer, with the date of such acknowledgment.”

This section is taken from an act which relates to the acknowledgment of a foreign deed, but has been held applicable to a deed acknowledged within the state.

Forrester vs. Reliable Transfer Co., 59 Wash., 92.

Barring that section, the statutes do not anywhere prescribe the contents of an acknowledgment. Section 8761 contains a form for individual acknowledgment which the statute itself says *shall be sufficient, but does not make the form exclusive*. Section 8761½ contains a form for an acknowledgment of an instrument signed by a corporation which the statute says *shall be sufficient, but the statute does not make this form exclusive*. Attention is called to the fact that the language of the two sections just referred to is identical. In both it is declared that the forms set out are sufficient. In neither is the form made the exclusive form.

In the case of *Kley vs. Geiger*, 4 Wash., 484, the Supreme Court, passing upon the validity of a mortgage which was claimed to be defective because the acknowledgment, although it complied with Section 8759, did not comply with Section 8761 (being the same sections therein referred to as sections 1435 and 1437, general statutes) uses this language:

“The objection to the acknowledgment is, that the officer before whom the same was taken did not certify that said defendants executed said mortgage freely and voluntarily. The acknowledgment does state that said parties appeared before such officer, and acknowledged that they signed and executed the same, and contains the further statement that upon the separate examination of the said Ida Geiger apart from her husband, she acknowledged that she signed

the same voluntarily. There is no force in the objection to the acknowledgment. Sec. 1435 of the General Statutes, which was in force at that time, provides that certificates of acknowledgment shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor. Sec. 1437, which was also in force at that time, provides that the certificate of acknowledgment substantially in the form there given shall be sufficient, which form contains a recital that the execution of the instrument was the free and voluntary act of the party executing the same. It does not provide that this form of acknowledgment shall be exclusive, and we are satisfied the acknowledgment which was taken wherein the defendants acknowledged that they signed and executed the mortgage without any further statement that they voluntarily did the same, was sufficient.”

It is material to note that the decision just above referred to was rendered long prior to the time when the Legislature enacted Section 8761½, the latter section being incorporated in the Session Laws of 1903. The Legislature, therefore, had in mind when it enacted Section 8761½ the construction which the Supreme Court of this state had given to Section 8761. Nevertheless, the Legislature used the same language theretofore employed in Section 8761; that is, the Legislature prescribed a form which it

declared should be sufficient and the Supreme Court had already held that this language did not make the form exclusive. It seems clear that the Legislature intended that the form for corporate acknowledgments set out in Section 8761½ should be a guide to go by, but not exclusive of other forms which complied with existing statutes. Had it intended to make the form set out in 8761½ exclusive, it would not have used language prescribing the form which had already been construed by the Supreme Court not to be exclusive of other forms. It seems to us, therefore, to be clear that following the construction of the statutes of this state already given to the statutes by the Supreme Court, this court must uphold the acknowledgment as an exact and literal compliance with the statutes of the state.

If our argument just preceding is sound, then the acknowledgment is absolutely in accordance with the statute. *Rem. & Bal. Code*, 8759, headed “Certificate of foreign acknowledgments,” but referring to foreign and domestic acknowledgments, (*Forrester vs. Reliable Transfer Company*, supra) requires that “the person or officer taking the acknowledgment shall certify the same by certificate written on or annexed to the mortgage. under his official seal. and shall recite in substance that the mortgage. was acknowledged by the person or persons whose names are signed thereto as grantor or principal. before such officer, with the date of such acknowledgment.”

Every requirement of the statute has been lit-

erally complied with. If we are right in the foregoing argument that the corporation form set out in the statute is not exclusive, then there can be no contention based upon any reason, however technical or fine drawn, but that the mortgage in controversy is valid.

The object of the courts, especially in this state, has been to get at the actual intent of the parties. It has not been to draw fine distinctions which would invalidate instruments intended by the parties to bind them. The supplemental opinion of the trial court, setting out as it does that the parties signed, sealed, acknowledged and delivered the instrument to secure a bona fide debt, is the best argument possible, in view of the settled policy of this and other states, why it should be sustained as a valid mortgage.

We do not have in this case any question arising where a bona fide purchaser or incumbrancer, in ignorance of the facts, advanced money on the faith of the unincumbered ownership. These people are protected by the statute. We do not have here the case of an unrecorded instrument where the holder of the mortgage has, by his carelessness or fraud, led others to advance their money. As far as actual acknowledgment and actual recording could protect the subsequent creditors they have been protected. The points raised as to the validity of the instrument are highly technical. No one has been actually injured. Up to the time when a lawyer, looking for defects, examined the instrument with care and com-

pared the words of the acknowledgment with the optional form set out in the statute, nobody knew that there was any possibility of beating the mortgagee out of the money which he had advanced on the faith of this instrument. If the point is sustained, then the technicalities of the law are successfully set up to avoid the actual rights and the actual equities of the parties. We contend that the court should investigate the merits of the controversy with a view to determining the rights of these parties according to the actual intent and the actual meaning, and should be keen to uphold rather than keen to destroy the contract which was made.

Respectfully submitted,

H. W. B. HEWEN,

MAURICE A. LANGHORNE,

ELMER M. HAYDEN,

Attorneys for Appellant.

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No. 2193
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a
corporation,

Appellant,

vs.

A. S. COATES, as Trustee in Bank-
ruptcy of Raymond Box Com-
pany, a corporation, bankrupt, et al,

Appellees.

STATEMENT OF THE CASE.

1. This case was tried in the court below, upon affidavits and stipulations as to certain agreed facts, all of which are made a part of the record and appear in the transcript.

2. The Pacific State Bank and the Raymond Box Company are, and each is a corporation organized and existing under and by virtue of the laws of the State of Washington.

3. That on the 2nd day of December, 1910, the Raymond Box Company was indebted to the Pacific State Bank in the sum of \$23,400.00 and on said date J. A. Heath and Miles H. Leach, president and secretary, respectively, of the Raymond Box Company, executed and delivered to the Pacific State Bank the instruments purporting to be a promissory note and

mortgage and being the same mortgage the validity or lien of which, is in issue.

4. That said promissory note and mortgage were and each was given for a pre-existing indebtedness which the said Raymond Box Company owed to the said Pacific State Bank.

See affidavit of Samuel McMurren found on page 57 of Transcript of record and the same is as follows:

STATE OF WASHINGTON, {
COUNTY OF PACIFIC. } ss.

Samuel McMurren, being first duly sworn, upon oath deposes and says: That he is a resident of Raymond, Pacific County, Washington; that he is employed as bookkeeper for the W. W. Wood Company of this city; that he has had 25 years' experience as a bookkeeper.

That on or about the 15th day of February, 1912, A. S. Coats, who was then temporary receiver for the Raymond Box Company, and requested that he audit the books and prepare a statement, and that thereafter he did examine and audit said books and accounts of the Raymond Box Company, and from the audit so made, found, and now finds that the purported mortgage now held by the Pacific State Bank, and which the bank alleges was given by the Raymond Box Company to secure a note in the sum of \$23,400.00 was given and dated on December 2, 1910, and was given for a pre-existing debt.

That at the time said purporting mortgage was

given as aforesaid, the amount due thereon was the only sum which the **Raymond Box Company** then owed and at that time it had no indebtedness whatever, except the amount due on said note and purported mortgage, and all of the accounts which it now owes and which was owing at the time it was adjudicated a bankrupt, have been created since the execution of said instrument, and said accounts in addition to the amount due to said bank, amount in the aggregate to about \$14,000.00.

That all of the creditors shown on the statement filed in the above proceedings by **A. S. Coats** and all of the creditors which have presented claims in the above-entitled matter, became creditors of the **Raymond Box Company** after the execution of said purported mortgage.

SAMUEL McMURRAN.

Subscribed and sworn to before me this 15th day of April, A. D. 1912.

(Seal.)

MARTIN C. WELSH.

Notary Public in and for the State of Washington,
Residing at **Raymond, Washington.**

5. It is stipulated by the parties that the value of the real and personal property described in said instrument claimed to be a mortgage, is approximately and does not exceed \$20,000.00.

See page 88 of Transcript of record.

6. The property covered by the alleged mortgage

is practically all of the property of the bankrupt corporation.

See allegations 6 and 7 of Appellant's petition, pages 6 and 7 of Transcript.

7. That there was due on said purported mortgage from the bankrupt corporation to the Pacific State Bank, on the 18th of March, 1912, \$22,357.71, with interest from October 1, 1911.

Stipulation pages 86 and 87 of Transcript.

8. That the value of the real and personal property covered by the mortgage does not exceed \$20,000.00.

Stipulation page 88 of Transcript.

9. That the bankrupt corporation is indebted in the sum of about \$14,000.00 to the answering creditors, other than the Pacific State Bank, and that all of said creditors became such subsequent to the execution of said instrument which appellant, claims to be a mortgage, and prior to the adjudication in bankruptcy, and that the following creditors had no actual knowledge of the fact of said alleged mortgage prior to the time that said bankrupt became indebted to them, to-wit:

Raymond Foundry & Machinery Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pearce Brothers and T. H. Bell.

Stipulation pages 88 and 89 of Transcript.

10. That at all times prior to the filing of the petition by the appellant for leave to foreclose, and at all times since and now the Trustee was and is in the

full actual and manual possession of all of the property of the bankrupt described in the mortgage.

Stipulation page 89 of Transcript.

11. That the purported mortgage was recorded in the real estate mortgage records of Pacific County, on December 8, 1910, and was filed on same date as a chattel mortgage, but was not recorded as such chattel mortgage.

Stipulation page 88 of Transcript.

12. The lower court held that the mortgage was void, and decreed that the claim of the Pacific State Bank be allowed as a general claim, and its claim for preference based upon its alleged mortgage be rejected.

Pages 92 to 107 of Transcript.

13. That J. A. Heath and M. H. Leach were not the sole owners of all of the stock of the bankrupt corporation at the time of the execution of this mortgage. The president, J. A. Heath, on or about May 1st, 1908, made an absolute sale of an undivided one-half interest in forty shares of the capital stock of the bankrupt corporation, the same to be delivered when the indebtedness of the bankrupt to the appellant was paid and the stock released; and that subsequent to the execution of this mortgage Effie McKenzie commenced an action against the said J. A. Heath to recover this stock or its value. (Record. T. P. 69, 70, 71, 72, 73 and 74).

From said judgment appellant has appealed.

ARGUMENT, POINTS AND AUTHORITIES.

The judgment of the court below should be affirmed for the following reasons:

FIRST.

The powers of the corporation are measured by its charter not only as to the things which it may lawfully do, but also as to the mode in which it may do them. If the charter requires the powers conferred to be exercised in a particular manner, or by particular officers or agents, and the provision is not merely directory, it can only exercise them in the mode pointed out.

7 A. & E. Enc. of Law (2nd Ed.) 701.

3 Washburn on Real Property (4th Ed.) 262.

U. S. Bank vs. Danbridge, 12 Wheat. 64.

Beatty v. Marine S. Co., 2 Johns, 109.

Pennsylvania L. R. Co. v. Board of Education, 20 W. Va. 360.

Under the laws of the State of Washington charters are not granted by the legislature to private corporations, but they are incorporated by the persons comprising the corporation voluntarily organizing and signing articles of incorporation under the general statute, and the charter of such corporation is necessarily the statutes relating to the formation of private corporations and the voluntary articles which are filed under them.

The general laws as to private corporations of the State of Washington may be briefly summarized as follows:

Section 3686 Rem. & Ball. Codes of Washington.

The corporate power of a corporation shall be exercised by a Board of not less than two trustees who shall be stockholders in the company, and at least one of them shall be a resident of the State of Washington, and a majority of them citizens of the United States, who shall, before entering upon the duties of the office, respectively take and subscribe to an oath as provided by the laws of this state, and who shall, after the expiration of the term of the trustees first elected, be annually elected by the stockholders, etc.

Section 3688, Idem, provides that a majority of the whole number of trustees shall constitute a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.

Among the enumerated corporate powers vested in the corporation, section 3683, of the same code, provides: That such corporation shall have the power to purchase or mortgage, sell and convey real and personal property.

It will thus be seen that a private corporation in this state can only exercise powers as such by and through its Board of Trustees. Only the trustees have power to mortgage the property of the corporation, and no act in the name of such corporation and seeking to bind the corporation can be lawfully performed except by the Board of Trustees. The president and secretary have no original powers, nor governing powers, and they have no authority, excepting certain min-

isterial acts by which they exercise powers delegated to them by the Board of Trustees. Every officer of a private corporation is subject to the will of a majority of the trustees comprising the board. To constitute a mortgage a valid mortgage and binding upon a corporation and its stockholders, the making, execution and delivery thereof must emanate from and be directed by the Board of Trustees, evidenced by a proper record of such proceeding spread upon the minutes of the corporation. The power to perform the ministerial act of making, executing and delivering such mortgage may be delegated to an officer of the corporation, usually the president and secretary, but these officers can only exercise such authority as has been delegated to them by the Board of Trustees. Their powers are practically the same as an attorney-in-fact. Their acts are limited to the authority conferred upon them by the Board of Trustees, hence a mortgage executed by the president and secretary of a corporation to be valid must be the act of the corporation itself and not of the president and secretary. The personality of the president and secretary are impotent, and their acts as individuals are of no effect. The substantial requisite is that to constitute a valid mortgage it must be the act of the corporation.

Some stress is laid upon certain decisions of the Supreme Court of Washington holding that if the persons performing the act in question, constitute the entire holding power of the corporation, then the formality of action by the governing body of the corporation may be dispensed with.

In this case, as will fully appear from the transcript from the superior court of the State of Washington in and for the County of Pacific, in an action brought by Effie McKenzie against J. Albert Heath (Record, page 69 *et seq.*) it appears from the findings of that state court that on May 1, 1908, eighteen months before the date of this mortgage, J. A. Heath sold absolutely an equal and undivided one-half interest in forty shares of the capital stock of the bankrupt corporation, delivery to be made as soon as the then certificates were released from the bank (Appellant) where the same were held as security for a loan to the bankrupt. This sale was absolute and Mrs. McKenzie became the legal owner of these shares of stock, although not accompanied by delivery, and as to the same J. A. Heath became trustee for Mrs. McKenzie. It is true that he reserved the right to vote this stock, but that did not effect her ownership or right to notice from the Board of Trustees as to the making of a contemplated mortgage jeopardizing her entire interest. While it is true that she could not vote, perhaps, it is equally true that the courts would have afforded her relief by injunction, in case the trustee were acting unlawfully or fraudulently.

The bankrupt corporation was located in the City of Raymond. The mortgage and the certificate of acknowledgment were executed at South Bend away from the office of the bankrupt, and possibly surreptitiously, in order that Mrs. McKenzie should be wholly unaware of the danger in which they were placing her interest. Suppose Heath did convert this stock. He was a

trustee, and if he could lawfully act on December 2, 1910, and make the mortgage in question he must have been a stockholder and possessed of stock in the bankrupt, and it is the universal rule, deduced from the decisions of the courts, that in legal effect instead of embezzlement and disposing of the stock of Mrs. McKenzie he would be held to have sold his own stock and Mrs. McKenzie's right of ownership was not impaired at the time of the execution of the mortgage beyond the difference in the amount of stock held and owned by Heath and the interest which she had.

SECOND.

That the purported mortgage is void because the notary public who took the acknowledgement does not certify that the persons who executed it were known to him to be the officers of the corporation. It is void because the certificate of acknowledgment does not show that the officer or officers who executed the instrument were sworn and on oath stated that they were authorized to execute the instrument, and that the seal affixed is the corporate seal of the corporation.

The statutes of the state so far as applicable are as follows:

(*Rem. & Bal. Code, Sec. 8745.*)

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

(*Rem. & Bal. Code, Sec. 8746.*)

"A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making

it, before some person authorized by the laws of this state to take the acknowledgment of deeds.”

As to acknowledgments by a corporation, at the time of the execution of said pretended mortgage, the laws of the State of Washington provided and now provide as follows:

“Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

STATE OF WASHINGTON,)
COUNTY OF PACIFIC.) ss.

“On this day of, A. D. 19..., before me personally appeared, to me known to be the (president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.”

“In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.”

.....,

(Signature and title of officer.”

Rem. & Bal. Code of Washington, Sec.

8761 $\frac{1}{2}$.

(L. '03, p. 245, Sec. 1.)

The above statute is repugnant to the general statutes relating to acknowledgment of instruments, and the same is exclusive and mandatory.

The certificate of acknowledgment to the instrument in issue, is as follows:

STATE OF WASHINGTON, }
COUNTY OF PACIFIC. } ss.

"Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, and said J. A. Heath, as president and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation." "Witness my hand and official seal.
(Notarial Seal.) H. W. B. HEWEN,

Notary Public for the State of Washington,

It will be observed that the statute positively declares that the certificate shall show that the officer or

officers, who execute the instrument, *was sworn and on oath stated that he was authorized to execute the instrument and that the seal affixed is the corporate seal of the corporation.*

It will also be observed that the statute requires the officer taking the acknowledgment to certify, that the *person executing the instrument is known to the notary public to be the identical officer of the corporation*, which the person so executing the instrument claims to be.

The certificate of acknowledgment to the instrument in question contains neither of the above essential facts.

The persons who executed it were not sworn, and neither of them, stated on oath that he was authorized to execute the instrument.

The notary public before whom the purported acknowledgment was taken, does not certify that either of said persons was an officer in any capacity of the corporation.

The acknowledgment does not substantially comply with the statute.

The instrument was and is void. It is not valid either as a real estate nor as a chattel mortgage. It creates no lien on the property of the bankrupt corporation.

The statutes of Washington, Section 8761¹/₂ of *Rem. & Bal. Code*, requires the officer or officers who assume to act for the corporation, to *state on oath that he was authorized to execute the instrument, and that*

the seal affixed is the corporate seal.

The statute also prescribes, *that the notary public must certify that the person assuming to act as a certain officer of the corporation, is known to the notary public to be such officer of the corporation.* The certificate must follow the statute which is mandatory.

Smith v. Guar. Dental Co., 114 N. Y. S. 867.

The acknowledgment to the instrument in question contains none of the material facts required by the statute.

The decisions of the courts are unanimous in holding such an instrument void.

· 2 *Thompson on Corporations* (2 ed.), Sec. 1884.

Forrester v. Reliable Transfer Co., 59 Wash. 86.

Anderson v. Frye & Bruhn, 69 Wash. 89.

Cannon v. Deming, 53 N. W. 863.

Erickson v. Conniff, 101 N. W. 1104.

Holt v. Metropolitan Trust Co., 78 N. W. 947.

Gage v. Wheeler, 21 N. E. 1075.

Abney v. Ohio Lumber Co., 32 Southeastern 256.

The case last cited is very similar to the case at bar, and because the officer who executed the instrument was not sworn as required by the statute, the instrument was adjudged to be void.

In 2 Thompson on Corporations (2 ed.), Section 1884, the author says:

"The statutes in many jurisdictions require a peculiar form of certificate in the case of the execution and acknowledgment of deeds by corporations; *and it must affirmatively appear from the certificate itself that the requirements of such statutes have been substantially complied with.*" "The statutes in many jurisdictions require not only an acknowledgment on the part of the corporation by the proper officer, *but also an oath or form as to the authority and identity of such officer.*" "More particularly such requirements are that the officer or agent of the corporation must be first sworn or affirmed by the magistrate taking the acknowledgment, *and he must under oath say:* (a) "that he is the officer or agent of the corporation described in the particular writing, giving the date or other sufficient description for the purpose of identification; (b) that he is duly authorized by the corporation to execute and acknowledge the deeds and writing of such corporation; (c) that the seal affixed to said writing is the corporate seal of the corporation; (d) that the deed or writing was signed and sealed by him on behalf of said corporation and by its authority duly given." "After such deposition is given, the officer or agent must acknowledge the deed or writing to be the act and deed of the corporation." "*All of these facts must appear in the certificate of the certifying officer, before the instrument can be legally admitted to record.*" "*Under these requirements a failure to show that the acknowledging*

party was duly sworn and that he deposed to the facts contained in the certificate, was held to be fatal."

In *John Forrester vs. Reliable Transfer Company*, 59 Wash., 86, the Supreme Court of the State of Washington said:

"We therefore think it is plain that our law requires acknowledgment of the execution of such instruments to be evidenced by certificate of the officer taking the same, and written upon or annexed to the instrument. It is also to be remembered that such instruments are not now as formerly required to be witnessed. *Code* of 1881, Sec. 2311, 2312; *Rem. & Bal. Code*, Secs. 8745, 8746. This fact would seem to enhance the importance of the certificate of acknowledgment, for it now remains as the only official authentication of the execution of the instrument required by our law." "In 1 *Cyc.* 616, the rule as to the admissibility of parol or other proof than the certificate, to prove acknowledgment of the execution of an instrument is stated as follows:

'It is the general rule that the official certificate is the only competent evidence of the fact of acknowledgment; and where such certificate is defective in a matter of substance, evidence aliunde is not admissible to show that the statute was in fact complied with, and that the officer, through mistake, failed to certify the acknowledgment correctly. If such evidence were allowed to supply a material part of the certificate, then logically it would be ad-

missible to supply an entire certificate, and the acknowledgment might therefore rest in parol.'

"As we proceed let us remember that we are not here concerned with a certificate of acknowledgment which is merely defective in form and substance. We are dealing with a problem involving the entire absence of any certificate having any reference whatever to the execution of this lease by appellant, the lessor. It is a matter of proving the acknowledgment absolutely unaided by any certificate."

"In the case of *Hayden vs. Westcott*, 11 Conn. 129, the court said:

'The statute requires that all deeds of land shall be acknowledged; and the only question is, how the acknowledgment shall be evidenced; because it is obvious that if parol evidence may be introduced, to aid a defective certificate, on the same principle it may be introduced to supply one. The acknowledgment may rest in parol, and the certificate of the magistrate may be entirely dispensed with. The claim now made inevitably leads to this conclusion. It can only be necessary to observe that such a claim is opposed to the uniform course of practice, to the spirit and meaning of the statute, and to the authority of adjudged cases.'

In the comparatively recent case of *Solt vs. Anderson*, 71 Neb. 826, 99 N. W. 678, the court observed:

‘Running through all the cases will be found a strong feeling against the admission of parol evidence to show the due execution of instruments affecting the title to real estate. The present case shows that such feeling is not unreasonable, and that sound considerations of public policy demand that, where an acknowledgment is necessary to give effect to an instrument, the evidence of the fact of such acknowledgment shall be preserved in a permanent form, and not left to the memory of living witnesses. In this instance, after the lapse of ten years, witnesses took the stand and testified to the exact legal phraseology used by the parties in acknowledging the deed; other witnesses were quite clear that no such language was used. Human memory should not be put to such a strain, nor land titles left to rest on so uncertain ground.’

“This was said in a case where there was no certificate, and the acknowledgment was attempted to be proved by parol.”

It was by virtue of the above decision of the Supreme Court of the State of Washington, and the universal rule and decisions of other courts, that Judge Hanford, in deciding this case in the trial court, said:

“I find among the papers an affidavit by Mr. Leach, secretary of the bankrupt corporation, affirming the facts omitted in the cer-

tificate of acknowledgment of the mortgage and also stating that at the time of the execution of the mortgage, all of the stock of the corporation was owned by himself and the president of the corporation, who joined in execution of the mortgage and that himself and the president were the only trustees of the corporation at that time." "I deem it sufficient to say in regard to this affidavit that it cannot be regarded as a plea of estoppel nor as competent evidence, either to sustain such a plea or to cure the defective certificate of acknowledgment."

The principle that where the statute requires certain acts to be performed, that such acts are a part of the execution of the instrument and not merely to permit recording, has been again announced by the Supreme Court of Washington as late as June 18, 1912. In the case of *Anderson vs. Frye & Bruhn Inc.* 124 Pac. Rep. 499, the following very pointed language, in enunciating this principle, is used in the opinion of Judge Parker:

"In compliance with these provisions, this court has declined to recognize the validity of leases and agreements for leases of real property for a period exceeding one year when they are not in writing, and when they are not acknowledged. *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N.

S.) 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312, Ann. Cs. 1912, 1093. In the last cited case the importance of the acknowledgment, in view of the provisions of the statutes making it an act to be performed as a part of the execution of the instrument and affecting its validity rather than as a mere prerequisite to its recording, was pointed out. It is apparent, under these statutory provisions, that the acknowledgment of the instrument is as necessary to its validity as that it be in writing, 1 *Cyc.* 514. In *Richards v. Redelsheimer*, touching the question of the necessity of an agreement for a lease, as well as a formal lease, being in writing, the court said: "When we come to consider the history of the statute, and the abuses which it sought to correct, principal among them being the tendency to fraud and perjury, it is difficult to distinguish any substantial difference between an oral contract to execute a written lease of real estate and an oral lease of real estate. For instance, an oral lease, which was clearly within the statute, could be construed to be a contract for a lease, and thus take the case out of the statute, and accomplish indirectly what could not be done directly. *Brown*, Statute of Frauds 139, and cases therein cited," 20 *Cyc.* 229. This language would be equally

applicable to the necessity of an acknowledgment to the instrument, under our statutes above quoted, since, as we have seen, acknowledgment is as necessary as writing. If absence of writing renders the contract void, the absence of acknowledgment also renders it void.”

And as Judge Hanford says, in one of his written opinions, in this case, (*Record*, page 100), the Circuit Court of Appeals for the Ninth Circuit, has repeatedly rendered decisions upholding the principle that statute prescribing the mode of executing instruments required to be recorded as evidence of rights to property in this state, are mandatory and such instruments lacking the prescribed solemnities are void.

Chilberg v. Smith, 174 Fed. 805.

Mills v. Smith, 177 Fed. 652.

In re Osborn, 194 Fed. 257.

Another case, exactly in point, from which no appeal was taken, is that of *First Nat. Bank v. Baker*, 62 Ill. App. 154, in which the Illinois Court held that the form of acknowledgment for corporations prescribed by statute was imperative.

In *Cannon v. Demig*, 53 N. W. 863 (S. D.) the Court says:

“Section 3288, Comp. Laws, relating to the certificate of acknowledgment and to recording transfers of real property, provides that ‘such certificate of acknowledgment, unless it is otherwise in this article provided, must be substantially in

the following form: (Venue) On this _____ day of _____, in the year _____, before me personally appeared _____, known to me, or proved to me on the oath of _____, to be the person who is described in and who executed the within instrument, and acknowledged to me that he (or they) executed the same.”

“In the acknowledgment upon the deed of assignment the words ‘known to me or proved to me on the oath of _____, to be the person who is described in and who executed the within instrument,’ are omitted.”

“Was this omission a fatal defect? The acknowledgment of an instrument must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument. Section 3281 Comp. Laws. There are at least four essential facts that must substantially appear in the certificate of acknowledgment, viz: (1) That the person making the acknowledgment personally appeared before the officer who makes the certificate; (2) that there was an acknowledgment; (3) that the person who makes the acknowledgment is identified as the one who executed the instrument; and (4) that such identity was either personally known or proved to the officer taking the ac-

knowledgment. The statute requires that the certificate shall at least set out substantially these essential facts."

"The authorities to this effect are numerous and quite uniform."

"The identity of the party making the acknowledgment is an essential feature, and must appear in the certificate. See authorities collated under title 'Acknowledgment,' 1 Amer. & Eng. Enc. Law, p. 154. An examination of the cases which hold that an omission of words of identity is not a fatal defect shows that there did not exist at the time a statute requiring such personal identification, or that the statute was substantially complied with. See same authorities cited in the above valuable work, at the same page. A majority of the statutes of the several states require the certificate to show that the party acknowledging the instrument was known to or proved to the officer to be the person who executed it."

"This is deemed to be a matter of substances, and an important safeguard against fraud."

In *Erickson vs. Conniff*, 101 N. W. 1104, 19 S. D. 41, the Court says:

"Rev. Civ. Code 1903, Sec. 974, provides that the acknowledgment of an instrument must not be taken, if executed by a corporation, unless the officer taking it knows or has satisfactory evidence that the person making the acknowledgment is the

president or secretary; and section 981 gives the form of a certificate of acknowledgment executed by a corporation, and provides that the officer must certify that the person acknowledging is known or proved to be the president or secretary. Section 636, Rev. Code Civ. Proc., 1903, provides that, to entitle one to foreclose a mortgage by advertisement, any assignment of the mortgage must have been duly recorded."

And the Court held,

"That where the certificate of acknowledgment of an assignment of a trust deed given by a corporation certified that the persons making the acknowledgment were personally known to the officer to be the vice president and assistant secretary of the corporation, the acknowledgment was insufficient to authorize recording of the assignment and a foreclosure of the trust deed by advertisement under section 636, was of no validity."

In *Holt vs. Metropolitan Trust Co.*, 78 N. W. 947 (S. D.), the Court says:

"This appeal involves the validity of a real estate mortgage foreclosure by advertisement. It seems to be conceded by counsel that the validity of the foreclosure proceeding depends upon the sufficiency of the certificate of acknowledgment of a certain assignment of the mortgage which was recorded in the proper county. Such assignment and certificate are as follows:

“For value received, the Fidelity Loan and Trust Company of Sioux City, Iowa, does hereby transfer and set over unto the Metropolitan Trust Company of the City of New York, trustee, all its right, title, and interest, in and to a certain first mortgage, for \$3,500, bearing date the 10th day of July, A. D. 1891, executed by Nellie Holt and husband upon 160 acres of land situated in Minnehaha county, South Dakota, and described as follows: (Here the land is described.) Said mortgage having been duly recorded in Book 42 of Mortgages, on page 159, of Minnehaha County, South Dakota records, on the 15th day of July, A. D. 1891. In witness whereof, the Fidelity Loan and Trust Company has caused these presents to be signed and delivered by its president and secretary this 27th day of August, 1891, with the seal of the company affixed. Joseph Sampson, President. John C. French, Secretary. (Seal of Fidelity Loan & Trust Co., Sioux City, Iowa).

“Witnesses: J. L. Ruine, E. C. Currier.

“State of Iowa, Woodbury County—ss.: On this 27th day of August, A. D. 1891, before the undersigned, a notary public in and for said county, personally came Joseph Sampson and John C. French to me personally known to be the identical persons whose names are subscribed to the foregoing instrument as president and secretary of the Fidelity Loan & Trust Company, the grantor therein named, and acknowledged said instrument to be the act and deed of said company, by them,

as officers of said company, voluntarily done and executed. Witness my hand and official seal the day and year last above written. F. J. Tripp, Notary Public. (Notarial Seal.)”

The objection to the certificate of acknowledgment is that the officer making it does not certify that the persons who acknowledged the execution of the assignment were known to him to be the president and secretary of the corporation.

The statutes of this state (Comp. Laws) contain the following provisions:

“Sec. 3281. The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath of affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation.”

“Sec. 3288. An officer taking the acknowledgment of an instrument must indorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed. * * * (2) The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form: ‘State of ———, County of ———, ss.: On this ——— day of ——— in the year ———, before me (here insert the and quality of the officer), personally appeared

———, known to me (or proved to me on the oath of ———) to be the president (or secretary) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.’ ”

“It is clear that a certificate of acknowledgment must substantially conform to the requirements of the statute.”

Such is the language of the statute, and the holding of this court. *Cannon vs. Deming*, 3 S. D. 421, 53 N. W. 863. The form prescribed for instruments executed by corporations requires a certificate that the person who makes the acknowledgment is known or proved to be the president or secretary of the corporation; and the preceding section of the statute positively prohibits an officer from taking the acknowledgment of an instrument, if executed by a corporation, unless he knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making the acknowledgment is the president or secretary of such corporation. The essential fact to be known by or proved to the certifying officer is that the person appearing before him is the president or secretary of the corporation. If he does not know this fact, the only evidence he can receive is the oath or affirmation of a credible witness. Therefore, he cannot act upon any presumption arising from the recitals or seal of the instrument itself.

“*In this case the officer certifies that Sampson*

and French are known to be the identical persons whose names are subscribed to the instrument as president and secretary of the corporation.” “This is far short of a certificate that they are known to be the president and secretary of the corporation.”

“He might have made this certificate truthfully, well knowing that they were not in fact officers of the corporation. The evident intent of the law is to prevent persons from representing themselves to be officers of corporations when they are not. The certificate does not substantially comply with the statute, the assignment was not so acknowledged and certified as to entitle it to be recorded, and the order of the circuit court overruling defendant’s demurrer to the complaint is affirmed.”

In *Gage vs. Wheeler*, 21 N. E. 1075 (Ill.) the Supreme Court says:

“But acknowledgments to conveyances to real estate can only be made when the grantor is personally known to the officer taking such acknowledgment to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness; and the fact of such personal knowledge or proof must be stated by such officer in the certificate of acknowledgment (Section 24, c. 30 Id.) the form of which certificate is given in Section 26 of the same chapter.”

“Here the certificate failing to show that the grantors were personally known to the officers, or

that they were proved to him by a credible witness are fatally defective. *Tully vs. Davis*, 30 Ill. 103; *Fell vs. Young*, 63 Ill. 106; *Shephard vs. Carriel* 19, Ill. 313. The instruments are, therefore, of no greater force if no attempt had been made to acknowledge them."

In *Bennett vs. Knowles*, 68 N. W. 111 (Minn.) the Supreme Court says:

"Where the deed or other instrument is executed by or on behalf of an individual, there is but little difficulty in establishing before the officer the identity of the party described therein, and who executed it, for, as a rule, such fact is personally known to such officer, but where the deed is executed by a corporation the difficulty is greatly increased. The acknowledgment for the corporation can only be made by some officer or representative who has authority to execute such instrument in its behalf,—in fact not generally within the personal knowledge of the officer taking the acknowledgment. It is nevertheless essential to the validity of such acknowledgment that it appear *prima facie* from the officer's certificate, when read in connection with the deed, that the person making the admission or acknowledgment as to the execution thereof was authorized to execute it for the corporation. If the certificate fails in this particular, the proof of the execution fails, precisely as it would in the case of the deed of an individual if the officer failed to certify as to the identity of the party acknowledging it." "If the acknowledg-

ment here in question had followed the statutory form, there could be no question as to its sufficiency. It would then have appeared on the face of the officer's certificate, *prima facie*, that the person making the acknowledgment was authorized to execute the instrument for the corporation. Gen. St. 1894, Sec. 5650. This statute, while it is not mandatory, and need not be strictly followed, yet it prescribed a certain and practicable method of making proof of the execution of a deed by a corporation before the proper officer, and certifying the same on the instrument so that such certificate or acknowledgment will *prima facie* prove the execution of the deed." "If any other form is adopted, the certificate must state all that is necessary to show a valid acknowledgment. No material fact can be omitted.

* * * * *

"The parties to the deed are designated therein as the New Columbia Athletic Club, party of the first part, and the plaintiff as the party of the second part. The conclusion and signatures are as follows: 'In testimony whereof, said party of the first part has hereunto set their hand and seal the day and year above written. The New Columbia Athletic Club. (Seal) W. A. Dunlap, President. (Seal).' Then follows the certificate of acknowledgment, which, omitting the venue, and official signature and seal, is in these words:

"On the 15th day of July, A. D. 1895, before

me, a notary public within and for said colnty, personally appeared W. A. Dunlap, who acknowledged that he is president of the within corporation, and that he signed the foregoing deed as its president and that he has been duly authorized to sign the same by the board of directors of said corporation, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that he executed the same as his free act and deed." *"It is to be observed that the officer taking the acknowledgment certifies that W. A. Dunlap appeared and acknowledged that he is president of the corporation, and signed the deed as such, and that he was authorized by the directors to sign the same; that is, he admits or acknowledges these facts before the officer, but he does not prove them by his oath, as the statute requires. Neither does the officer certify that Dunlap is known to him to be such president, and authorized to execute the deed for the corporation."*

We call the Court's attention to the fact that the last case above quoted from and the one at bar are very similar; very much alike in that the statute is almost identical with the statute of Washington, and that the certificate of acknowledgment is like the one in question. The court is positive that the instrument is void, because of the lack of authority to execute it, for in that case, as here, the officer does not on his oath state that he had authority to execute the in-

strument; and the officer who took the acknowledgment there, as here, does not certify that the officer executing the instrument was personally known to be that identical officer.

THIRD A.

Because that even if the mortgage could be held valid as a real estate mortgage, it is void as a chattel mortgage, because it was not recorded as a chattel mortgage in the office of the auditor of Pacific County, Washington.

(See stipulation on page 88 of Transcript on the point that the instrument was never recorded as a chattel mortgage.)

Section 3668 of Rem. & Bal. Code of Washington, which is Section 4559 of Ballinger's Code, provides as follows:

“A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose.”

That section of the code was passed by the legislature of said state in 1879, and the same has ever since that time been in force and effect.

The laws of 1889, requiring a chattel mortgage to be only filed in the county auditor's office, relates only to mortgages for \$300.00 or less, but all mortgages in excess of \$300.00 *must be recorded*, and if not re-

In our opinion these cases have never been overruled and the construction placed on the statute by the above decisions is still the law of this state.

Urquhart vs. Cross, 60 Wash. 249, cited by appellant was a case where the court held that the transfer of the possession and title of mortgaged chattels to a bona fide mortgage, in satisfaction of the debt, is valid against an attachment by a subsequent creditor without regard to the validity of the mortgage.

It was a case where the mortgagor had transferred the title and possession of the property described in the void mortgage, prior to the time that the creditor attached, so that when he attached the property, neither the title nor possession of the property was in the mortgagor.

Great stress is placed by the appellant's brief upon several cases decided by the Supreme Court of Washington in which defective acknowledgments were sustained as being in substantial compliance with the statute. A careful reading of these cases will show that there had been under the alleged defective instrument, either a change of possession or an intervention by vested rights. One of the most important features of this case, to be constantly borne in mind, is that the appellant bank at no time had either real or constructive possession of the property described in the mortgage, but that immediately upon the adjudication of bankruptcy the trustee took, ever since and now has full, actual and manual possession of all of the property of the bankrupt described in the mortgage. (Record, page 89.)

We therefore earnestly maintain that the law as enunciated in the decisions in 16 Wash. 499, and in 12 Wash. 190, 40 Pac. 729, is the law of the State of Washington, for in those cases the point discussed here was there in issue and decided.

The law of these cases is based on the better reason, because, otherwise a secret lien may exist on property, and persons dealing with the owner and becoming his creditors, on the strength of his ownership, would be defrauded, if the statute only related to and protected only creditors who were such when the instrument was executed.

This mortgage not having been recorded as a chattel mortgage, was and is void as to the creditors who become such after the execution of the mortgage, because they not knowing of the existence of the mortgage parted with their money and gave it to the bankrupt corporation, on the strength of, and believing its property to be unincumbered.

In *Dunsmuir vs. Port Angeles Gas Etc. Co.*, 24 Wash., 104, the Supreme Court of the State of Washington says:

“Our statute provides that a mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors, and is acknowledged and recorded in the

corded it does not impart notice to creditors.

In *Merritt vs. Russell & Co.*, 44 Wash. 143, 87 Pac. 70, the Supreme Court of Washington said:

“Whether or not this is true must depend upon the question as to whether or not said Section 4559 of Bal. Code being section 3668 of Rem. & Bal. Code is repealed by the act of 1899. The latter act not purporting to cover the entire subject matter of the former statute, and having no repealing clause, and repeals by implication not being favored, it follows that the provision in Section 4559 for the recording of the mortgage in the county to which the property has been removed is still in force, unless there is something in the act of 1899 repugnant thereto. We find in the latter act no such inconsistent provision.

“Therefore, the appellant not having within thirty days after the removal of the property from Whitman to Spokane County caused the mortgage to be recorded in the latter county, and not having within said period taken possession of the same, its lien thereupon, as against these respondents who purchased the property in good faith and without knowledge of the mortgage, became ineffectual.”

By referring to the Session Laws of 1899 of Washington, Section 6, being Section 3665 of Rem. & Bal. Code, it will be observed that the act of 1899 only refers to chattel mortgages for \$300.00 and less. See also the notes to Sec. 3659 of the latter code by the compiler.

See also *Fenby vs. Hunt*, 53 Wash. 127, 101 Pac. 492.

Chattel mortgages for more than \$300.00 must under said Section 3668 of Rem. & Bal. Code, be recorded in a book kept exclusively for that purpose in the office of the auditor of the County where the personal property is situated, and recording in the real estate mortgage records is not constructive notice.

Dunsmuir vs. Port Angeles Gas Company,
24 Wash. 104.

Manhattan Trust Company vs. Seattle Coal Company, 16 Wash. 499.

Radebough vs. Tacoma & etc. Ry. Company,
8 Wash. 570.

Subsequent to the decision of *Roy vs. Scott*, 11 Wash. 399, relied upon by appellant, as sustaining the doctrine that the statute did not make the instrument void where it was not recorded, as to persons, who became creditors subsequent to the execution of the mortgage, the Supreme Court of the State of Washington, in several cases decided positively and unequivocally that the *Statute did cover and does make void an unrecorded chattel mortgage as to persons who became creditors subsequent to the execution of the mortgage*. These later cases referred to are:

Manhattan Trust Co. vs. Seattle Coal & Iron Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729.

same manner as is required by law in conveyance of real property. 1 Hill's Code, Sec. 1648; Bal. Code, Sec. 4558. And it is further provided that such mortgage must be recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose. 1 Hill's Code, Sec. 1649; Bal. Code, Sec. 4559. The respondent's mortgage, it is conceded, was recorded in the records of real estate mortgages only, and if, as appellant contends, it is a mortgage of personal property, the record imparted no notice to appellant, and it will not be necessary to determine any question other than that presented by the third assignment of error."

Those who became creditors of the bankrupt, subsequent to the execution of the mortgage, may attack the mortgage, as the statute protects such creditors, against a mortgage such as the one in issue.

In *Willamette Casket Co. vs. Cross etc. Co.*, 12 Wash. 190, the Court said:

"That part of said section material to this question is as follows:

'A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless * * * it is * * * recorded in the same manner as is required by law in conveyance of real property.'

"And if the language used be given its ordinary significance, it would seem to fully warrant

such contention. It is claimed, however, by the respondent, that only such creditors are protected by the provisions of this section as before the time of the recordnig of the mortgage have obtained some specific lien upon the property."

"But such construction would do violence to the language used. The statute makes no distinction as to the creditors who are to be protected, and we see no good reason for holding that one class rather than another was intended. One is as much a creditor before his claim has been make a specific lien upon certain property as after, and for that reason an unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim."

"The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, *and to give force to such intention the term 'creditors,' as used in the act, must be held to cover all classes of creditors.*"

"The cases cited by the appellant from this court, while not directly in point, are sufficiently so to justify their citation in support of the contention. The cases so cited are *Barten vs. Smith*, 2 Wash. T. 97 (4 Pac. 35); *Darland vs. Levins*, 1 Wash. 582 (20 Pac. 309); *Hall vs. Matthews*, 3 Wash. 407 (36 Pac. 262); and *Radebaugh vs. Tacoma & Puyallup R. R. Co.*, 8 Wash. 570 (36 Pac. 460)." "The language of the statute, and

these authorities, satisfy us that it was the intention of the legislature to give no preference to a chattel mortgage over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution, that the mortgage in question was not recorded within such reasonable time."

"As to whether or not creditors whose claims existed at the time the mortgage was executed could take advantage of the failure to record, it is not necessary for us to decide, for the reason that, as we have seen, the court found that these creditors became such after the date of the mortgage. If the mortgage was thus inoperative as to creditors, we do not think it will be seriously contended that it would not be inoperative as to the receiver as their representative: for while it is true he also represents the corporation itself, yet his appointment prevented them from protecting themselves and must be held to have fully protected their rights."

In *Manhattan Trust Co. vs. Seattle Coal & Iron Co.*, 16 Wash. 499, the court says:

"A mortgage of personal property must be recorded in the office of the county auditor of the county, in which the mortgaged property is situated, in a book kept exclusively for that purpose."

"The plain, literal meaning of these sections is against the contention of plaintiff that it has

any lien whatever upon the personal property in the possession of the receiver as against these petitioners. There is no evidence whatever that the petitioners had any notice of the existence of any chattel mortgage in favor of the plaintiff. Counsel for plaintiff and receiver argued that, as petitioners, as creditors, have not negatived notice or knowledge on their part, it should be inferred against them; but this would be a novel rule and one that we have never seen applied. Such allegation and proof of notice should come from the one claiming the personal property under the alleged mortgage. But we are not prepared to decide that in any view there could be here a chattel mortgage as against these creditors."

"In *Willamette Casket Co. vs. Cross Undertaking Co.*, 12 Wash. 190 (40 Pac. 729) this court held a mortgage void as to subsequent creditors, which was not recorded in a reasonable time after its execution. The court said:

'The language of the statute, and these authorities, satisfy us that it was the intention of the legislature to give no preference to a chattel mortgage over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution.' *Barter vs. Smith*, 2 Wash. T. 97 (4 Pac. 35); *Hinchman vs. Point Defiance Ry. Co.*, 14 Wash. 349 (44 Pac. 867); *Mendenhall vs. Kratz*, 14 Wash. 453 (44 Pac. 872); *Radebaugh vs. Tacoma, etc. R. R. Co.*, 8 Wash. 570 (36 Pac. 460)."

THIRD B.

It having been established by the facts and the authorities set out heretofore in this brief that the mortgage is void, because it was not acknowledged as required by the statute, and because it was never recorded as a chattel mortgage, we now contend:

That general creditors of the bankrupt who became such since the execution of the mortgage, could have attacked the mortgage, if the corporation had not been adjudged a bankrupt, and that now the trustee in bankruptcy being in possession of the property, may on behalf of such creditors attack the validity of the mortgage.

Manhattan Trust Co. vs. Seattle Coal & Iron Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190.

I Loveland on Bankruptcy (4th Ed.) Sec. 372 also Sec. 371.

Knapp vs. Milwaukee Trust Co., 216 U. S. 545-54 Law Ed. 610.

In Re Brazlmore, 189 Federal Rep. 236.

In re Pekin Plow Co., 112 Fed. 308.

In re Beede, 126 Fed. 853.

The rule contended for by appellant on pages 15 and 16 of its brief, is not the law, especially under the amendment of the bankruptcy act of June 25, 1910. The object of the amendment was to protect general creditors of the bankrupt as well as those having liens by judgment or attachment against the property of

the bankrupt.

The amendment provides that "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 8 of the Act of June 25, 1910, amending Sec. 47a of the Act of 1898.

I Loveland on Bankruptcy (4th Ed.) Sec. 372, page 768, it is said:

"It will be observed that it is section 47a, relating to the collection of assets, and not section 70a, vesting title in the trustee that is amended. For the purpose of reclaiming property for the estate the trustee is given the rights, remedies and powers of a lien creditor with respect to property in custodia legis; and those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis, in lieu of the rights of a general creditor to which he was limited prior to this amendment."

"The trustee may be said to now stand in the shoes of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor instead of a general creditor as

before the amendment. He may now challenge any security or conveyance that a lien creditor or a judgment creditor might challenge had bankruptcy not intervened. But a lien which is valid under the state law as against the claims of such creditor is valid under the bankrupt law as against a trustee since the amendment as well as before it." In *Re Brazemore*, 189 Fed. Rep. 236, it is said:

"The class of cases, unprovided for, by the original act, and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the protential rights of creditors of that class. The language is readily susceptible of this construction." "It recites that such trustee shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate."

In *1 Loveland on Bankruptcy*, Section 371 the author says:

"The trustee is vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, except in so far as it is to property which is exempt."

“The trustee takes the title that the bankrupt had at the date of adjudication, and also the title that the bankrupt had to property fraudulently conveyed or encumbered at the time of the fraudulent transaction.”

“It may be said generally that the trustee stands in the shoes of the bankrupt, and the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. He takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition subject to all valid claims, liens and equities. Bankruptcy does not suspend the jurisdiction of equity to correct errors in written contracts caused by mutual mistake. What are valid claims, liens and equities is considered at length in another place.”

“This general rule prevailed under the former act. It has been the rule under the present act and is not changed by the amendment of 1910, *which gives the trustee additional ‘rights, remedies and powers’ to avoid liens, transfers and conveyances, as will be presently pointed out.*”

“Special provisions of the act place the title to certain property, encumbered with liens or transferred by the bankrupt, in the trustee and give him the power to avoid the same. Such transfers and encumbrances may be good as against the bankrupt. In some cases the creditors might

have set them aside, and in other cases they could not do so, had bankruptcy not intervened." *"The trustee may be said to stand in the bankrupt's shoes with additional powers conferred by special provisions of the act.*

"By these special provisions the trustee in bankruptcy is vested by the operation of law with the title the bankrupt had to all property transferred by him in fraud of creditors, or as a preference, or where the transfer or incumbrance is void as to creditors by the laws of the state, territory or district in which the property is situated. Property subject to liens created through legal proceedings within four months prior to the filing of the petition, passes to the trustee as a part of the state free of the lien, unless the court subrogates him to the right of the creditor holding the lien."

"These provisions confer on the trustee the title to the property mentioned and give him power to avoid the conveyance or encumbrance and reclaim the property for the estate. To this end he is vested with all the rights, remedies and powers of a lien creditor with respect to property in custodia legis, and with those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis."

In First Loveland on Bankruptcy (4th Ed.), Section 434 it is said:

"The validity and extent of a lien on the prop-

erty of a bankrupt is determined by the local law as construed by the highest courts of the state.

* * * The validity and extent of a lien created by a transfer of property by way of mortgage, deed, bill of sale, conditional sale, pledge, or otherwise presents a question of local law."

It will be observed from the authorities heretofore cited in this brief that this mortgage was not acknowledged as required by the laws of the State of Washington, and consequently it is invalid as a real estate mortgage, and it was not recorded as a chattel mortgage and consequently it is invalid as a chattel mortgage. It will also be observed that by the decisions of the supreme court of the State of Washington, creditors who become such, subsequent to the execution of the mortgage may attack the validity of the mortgage. See the cases heretofore cited, namely:

Manhattan Trust Co. vs. Seattle Coal Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729.

In *Knapp vs. Milwaukee Trust Co.*, 216 U. S. 545-54, Law Ed. 610 particularly page 615, the court says:

"But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that, as to them, the trustee in bankruptcy occupies no better position than the bankrupt.

This question was raised and decided in *Security Warehousing Co. vs. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789. That case arose in Wisconsin, and it was therein held that under the law, an attempted pledge of property, without change of possession, was void under the laws of that state. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized and that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt."

"But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying Sec. 70a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore

held that, as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy, and passed to the trustee in bankruptcy.”

“The principles announced in *Security Warehousing Co. vs. Hand*, *supra*, when applied to the present case, are decisive of the question here presented. Under the Wisconsin statutes and decisions of the highest court of that state the conditions contained upon the face of this mortgage were such as to render it fraudulent in law and void as to creditors, and prior to the filing of the petition in bankruptcy the property might have been levied upon and sold by judicial process against the bankrupt.”

“The suggestion in appellant’s brief, that the trustee in bankruptcy may possibly recover against directors and officers of the corporation for dereliction of duty, and against stockholders for unpaid subscriptions an additional liability on their part, presents no reason why he may not resist an attempt to take all the available property in his hands to apply on a mortgage void as to creditors at the time of the adjudication.”

“We are of opinion, for the reasons stated, that the mortgages in question are void, and that, under the bankruptcy law, the trustee can assert their invalidity.”

In *Mitchell vs. Mitchell*, 147 Fed. 281, which was a case where creditors who became such subsequent to the execution of a chattel mortgage, the court said:

“The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution, and creditor’s bills, vests in him at once the title to the property—makes him the owner.”

“It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors.” “It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted.”

THIRD.

It is argued in appellant’s brief that justice requires the sustaining of the mortgage, but in this respect we differ from the appellant and insist that the equities are not with the appellant.

Referring to the affidavit of Samuel McMurrin, found on page 57 of the transcript, and the affidavit of Miles H. Leach, found on page 59 of the transcript,

it is but fair to assume that this mortgage was given by the bankrupt corporation to the appellant to secure a pre-existing debt which the bankrupt owed appellant, consequently appellant does not come within the definition of an incumbrancer for value and in good faith as that term is defined by the laws of the State of Washington.

Hicks vs. National Surety Co., 50 Wash. 16.

In the above case the court said:

“That this statute makes a broad distinction between creditors and subsequent purchasers or incumbrancers. As to the former it positively declares that chattel mortgages are void unless they are accompanied by the specified affidavit and are acknowledged and recorded as required by law. But an incumbrancer or subsequent purchaser, in order to avail himself of an omission of the affidavit, or of a failure to acknowledge or record the instrument, must be able to show that he is an incumbrancer for value and in good faith.”

Mendenhall vs. Kratz, *supra*.

“The instrument under which appellant claims was taken as security for a pre-existing debt or a pre-existing contingent liability. Under such circumstances does it come within the definition of an incumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not.”

Finally, upon the law of the entire case and all questions arising here. we confidently cite the two

written opinions of Judge Hanford, an eminent authority who adorned the Federal bench for more than two decades. (Record, pages 92-101.)

We submit that the judgment of the district court should be affirmed and the appellees should recover their costs and disbursements herein.

Respectfully submitted,

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IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a
corporation,

Appellant,

vs.

A. S. COATES, as Trustee in Bank-
ruptcy of Raymond Box Company,
a corporation, bankrupt,

Appellee.

No. 2193

APPEAL FROM THE DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT

In the statement of the case by appellees, it is said that the promissory note and mortgage were given for a pre-existing indebtedness. (Paragraph 4, page 4.) This statement is not correct, as ap-

pears by the record, as will be hereafter shown. The statements contained in Paragraph 13, on page 7, of appellees' brief, are not, as we contend, true. The facts in this regard are to be ascertained from the affidavit of Mr. Leach (page 68, Transcript) and the findings and judgment of the Superior Court of the County of Pacific in the case of *McKenzie, Administrator, vs. J. Albert Heath*. (Trans., page 69, and Stipulation of Facts, page 86.)

ARGUMENT.

Under the second head of their brief, appellees contend that the purported mortgage is void because the notary who took the acknowledgment does not certify that the persons who executed it were known to him to be the officers of the corporation, and because the certificate does not show that the officers who executed the instrument were sworn. In discussing this question the appellees contend that the statute authorizing a form therein set out as a form for corporate acknowledgment is repugnant to the general statute relating to acknowledgment of instruments, and is exclusive and mandatory, but they cite no authorities in support of their position.

As we pointed out in our opening brief, the Supreme Court, in the case of *Kley v. Geiger*, 4 Wash. 484, has held that a form provided by the

Statutes of Washington for individual acknowledgments, and stated by the statute to be sufficient, is not an exclusive form. The language of Section 8761½, Remington & Ballinger's Code, containing a form for corporate acknowledgment, does not upon its face make that form exclusive, but says it shall be sufficient. The form considered in *Kley v. Geiger* did not comply with the form set out in Section 8761, Remington & Ballinger, which is stated therein to be sufficient. We believe it follows that the Supreme Court of this state would hold, and in effect have held, that the form set out in 8761½ is an optional form only. See also:

Bennett v. Knowles, 68 N. W. 111.

Boswell v. First Nat'l Bank, 92 Pac. 631.

Counsel has diligently collected the cases from different jurisdictions decided under varying statutes and varying circumstances and relations of the parties wherein the particular acknowledgments are held to be insufficient, and deduces therefrom that the courts are "unanimous" in holding such acknowledgments, and the instruments to which they are attached, void. Of course, this statement of counsel cannot be taken as correct, since, as stated in Cyc., Vol. 1, page 513, "except where the statute expressly makes acknowledgment essential to the validity of the instrument, it is universally held that an acknowledgment is no part of the contract between the parties, and the instru-

ment is valid without it," and since the Supreme Court of the State of Washington has in numerous cases held that deeds, mortgages, chattel mortgages and bills of sale are valid between the parties, whether acknowledged or not. See cases quoted on page 22 of our brief. See also:

Hicks v. National Surety Co., 50 Wash. 16.

Chase v. Tacoma Box Co., 11 Wash. 377.

Roy v. Scott Hartley & Co., 11 Wash. 399.

Mendenhall v. Kratz, 14 Wash. 453.

The cases cited from other states do not give much light on the case at bar because this is purely a question of Washington law under Washington statutes, but an examination of the decisions generally shows that the policy of the State of Washington to render valid and to give force and effect to all conveyances voluntarily and in good faith signed by the grantors, and not to render such deeds ineffectual in consequence of an informality or defect as to the proof of their execution (*Carson v. Thompson*, 10 Wash. 295) is generally followed by a large majority of the courts of last resort.

In Cyc., Volume 1, page 582, it is stated:

"It is a rule of universal application that a literal compliance with the statute is not to be required for a certificate of acknowledgment, and that if it substantially conforms to the statutory provisions as to the material facts to be embodied therein it is sufficient. * * * It is the policy of the law

to construe them liberally and not to allow a conveyance to be defeated by unsubstantial objections to the certificate of acknowledgment."

See also *Summer v. Mitchell*, 29 Florida 109, 10 So. 562, 14 L. R. A. 815, where it is stated that "all technical omissions will be disregarded," and that "it should be the aim of the courts to preserve and not to destroy."

Out of the multitude of cases which illustrate the liberality of courts in sustaining the instrument, disregarding formal facts, we refer to the following:

An acknowledgment reciting that the president and secretary acknowledged the instrument as their voluntary act and deed, is held sufficient.

Eppright v. Nickerson, 78 Missouri 482.

Tenny v. East Warren Lumber Co., 43 N. H. 343.

McDaniels v. Flower, 22 Vermont 274.

An acknowledgment on behalf of a bank by the president and cashier wherein they acknowledge that they executed the instrument for the purposes and considerations there contained, held sufficient to show that the instrument is the instrument of the corporation.

Muller v. Boom, 63 Texas 91.

Under a statute requiring the certificate to state substantially that the person making the acknowledgment is known to the officer, a certificate re-

citing "personally appeared J. T. Bates, tax collector of said county, to me well known and acknowledged," and signed J. T. Bates, Tax Collector, is held to be a substantial compliance with the statute.

Schleicher et al. v. Gatlin, Texas, 30 S. W. 120.
See also,

Zimbleman v. Stamps, 51 S. W. 341.

In the case of *Fitch v. Lewiston Steam Mill Co.*, 12 Atlantic 732, from the acknowledgment it appeared that "Jas. Wood, treasurer, personally appeared and acknowledged the above instrument to be his free act and deed." This was sustained as the acknowledgment of the corporation, and the case of *Tenny v. East Warren Lumber Co.* was cited approvingly.

As to the general policy of the courts in sustaining acknowledgments, see also *Boswell v. First National Bank*, 92 Pac. Opn. 631. In the last cited case it is held that a statement in the certificate that the subscriber personally appeared, necessarily implies that he was personally known.

That the instrument acknowledged may be resorted to for support to the acknowledgment, see *Summer v. Mitchell*, 29 Florida, *supra*, and Cyc., Volume 1, page 584, and *Lea v. Polk Co. etc.*, 75 U. S. 513. There is not any substantial conflict on this point.

Aside from the contention that the form given

in the statute is exclusive, the case of *Banner v. Rosser, Virginia*, 31 S. E. 67, Opn. 72, is in all essential respects on all fours with the instant case. It was there claimed that the acknowledgment was insufficient because the notary's certificate did not certify that the person acknowledging was the president of the corporation. The court said, however:

"The deed * * * was signed by the Minneapolis Improvement Co., by Thomas Rosser, president, with the corporate seal affixed and the certificate of the notary states that 'Thomas Rosser, president, whose name is signed to the writing hereto annexed, bearing date of the second day of December, 1891,' acknowledged the same before him in his county. It identifies the subscriber, specifies the writing subscribed, states the capacity in which he executed it and certifies his acknowledgment thereof. The foregoing contains all that is necessary. See *Bank v. Goddin*, 76 Virginia 506."

State v. Coughran, 19 S. D. 271.

Counsel for appellees rely upon two Washington cases holding that leases are invalid because they are not acknowledged.

Forrester v. Reliable Transfer Co., 59 Wash. 86.

Anderson v. Frye & Bruhn, 69 Wash. 89.

It will be conceded that the Supreme Court of this state have so held under the peculiar wording of the statute relating to leases, but this is not the statute under which the instrument in controversy is to be construed, either as a chattel mort-

gage or as a real estate mortgage, and, as we pointed out in our opening brief, the Supreme Court have uniformly sustained both real estate mortgages and chattel mortgages as between parties without any acknowledgment at all. See cases cited on page 52 of our brief, and see

Hicks v. National Surety Co., 50 Wash. Op. 18, and cases therein cited.

Counsel has not found any cases decided by our Supreme Court where instruments have been held void by reason of defective acknowledgments, though they have found two cases under a statute with relation to leases, holding them invalid even as between the parties, where they are wholly lacking in acknowledgment; but we believe it to be entirely established in this state that deeds and mortgages, whether real or chattel, are good, at least between the parties, without any acknowledgment, and further, that this state has gone as far as any state in sustaining defectively acknowledged instruments as against third parties.

We have fully discussed in our opening brief the policy of the statutes and decisions of this state in sustaining acknowledgments (p. 23 *et seq.*), and have quoted in full (p. 24) Section 8784, Remington & Ballinger's Code (taken from Act of 1881 relating to Deeds), providing that instruments purporting to convey or encumber real property which have been recorded in the proper auditor's office

shall "impart the same notice to third persons from the date of recording as if the instrument had been executed, acknowledged and recorded in accordance with the laws regulating the execution, acknowledgment and recording of such instrument then in force."

II.

Under the head of "THIRD A," counsel for appellees discuss the proposition that the mortgage, even if entered as a real estate mortgage, is void as a chattel mortgage because not recorded as a chattel mortgage in the office of the Auditor of Pacific County, Washington.

In the Session Laws of 1899, page 158, Section 2 of "an act relating to chattel mortgages and the filing thereof, and repealing all laws in conflict therewith," the Legislature, referring to chattel mortgages, uses the following:

"Sec. 2. Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads: 'The time of filing,' 'Name of Mortgagor,' 'Name of Mortgagee,'

'Date of Instrument,' 'Amount Secured,' 'When Due' and 'Date of Release.' An index to said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this act the sum of fifteen cents for every instrument, and the moneys so collected shall be accounted for as other fees of his office. Such instrument shall remain on file for the inspection of the public."

Sections 3 and 6 of the same Act are as follows:

"Sec. 3. Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world of the existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due the mortgagee, his agent or attorney shall make and file as aforesaid an affidavit setting forth the amount due upon the mortgage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall endorse on said affidavit the time it was filed."

"Sec. 6. That a mortgage given to secure the sum of \$300 or more, exclusive of interest, costs and attorneys or counsel fees, may be recorded and indexed with like force and effect as if this act had not been passed, but such mortgage or a copy thereof must also be filed and indexed as required by this act."

The Supreme Court of the State of Washington in the case of *Averill v. Allbritton*, 51 Wash. 30, in construing a chattel mortgage securing a note

for \$800, held that the copying of the mortgage upon the records as in the case of a real estate mortgage is not required, but that placing it on file and indexing it in the Auditor's office was sufficient. See opinion, page 32. In the case of *Mills v. Smith*, 177 Fed. 652, this court, referring to the Act of 1899 just above referred to, says:

“The Act of 1899 provides for the filing of chattel mortgages within ten days from the execution thereof and the indexing of the same, and declares that such filing and indexing shall be considered sufficient notice to the world. * * * Its purpose was to dispense with the necessity of recording chattel mortgages and to substitute a different registration therefor, leaving it optional with the mortgagee to record mortgages of \$300.00 and more in accordance with the prior act, in addition to filing them in accordance with the law.”

It is obvious that Section 6 quoted above merely preserves the right formerly enjoyed by mortgagees of recording their mortgages if over the sum of \$300, but does not make it mandatory. The mandatory thing required by the Legislature was the filing and indexing, and not the recording.

The case of *Merritt v. Russell*, 44 Wash. 143, cited by respondents, only holds that when property is moved to another county the appellant must, under the old act, cause his mortgage to be entered in the latter county, which had not been done in the case there under consideration.

The cases found on page 36 of appellees' brief, in 24, 16 and 8 Washington, were decided prior to the passage of the Act of 1899 and are not authority as to its construction.

The case of *Fenby v. Hunt*, 53 Wash. 127, holds that it is not necessary to record a chattel mortgage where the debt secured is less than \$300, a proposition to which we take no exception.

THE RIGHTS OF SUBSEQUENT CREDITORS.

Incorporated under this same head, counsel attempt to meet the proposition discussed in our brief, pages 15 *et seq.*, under the head, "Alleged Defective Acknowledgment," wherein we sought to demonstrate that under the law as established by our Supreme Court the trustee in bankruptcy who represented only creditors who became such subsequent to the date of the mortgage could not object to its validity either as a real or a chattel mortgage on the ground of any alleged defect in the acknowledgment. In our brief we cited *Roy v. Scott*, 11 Wash. 399, and *Urquhart v. Cross*, 60 Wash. 249. Appellees cite *Willamette Casket Co. v. Cross etc.*, 12 Wash. 190, and *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499.

It must be conceded that it is hard to reconcile these cases. In the case of *Roy v. Scott*, the Supreme Court had before it a question in all essential respects identical with the question now before the

court. Roy & Co. sought to foreclose a mortgage on the property of Scott Hartley & Co. McNaught was a subsequent purchaser who had recovered a judgment. The position of McNaught is similar to the position of the trustee who represents the general creditors, who, under the bankruptcy law, may be considered to have reduced their claims to judgment.

The Supreme Court first holds that since the president and secretary are the only stockholders of the corporation, and are the persons who executed the instrument, the mortgage is good as against the corporation. (Opn. 403.) The court then expressed its views as follows:

“Appellant McNaught, not only had no interest in or lien upon the property at the time that the mortgage and bill of sale in question were given, but the court has found that he was not at that time a creditor, and that there was no actual fraud in the transaction itself. Hence he clearly is not in a position to void the transaction. * * *

The statute makes the chattel mortgage (unaccompanied by the affidavit) void only as against creditors of the mortgagor or subsequent purchasers and encumbrancers of the property for value and in good faith. The word ‘subsequent’ relates, not to creditors, but to purchasers and encumbrancers. Between the mortgagor and mortgagee the instrument was valid and binding as a mortgage without the affidavit, and McNaught, being at this time a mere stranger to the property and having no interest in it, cannot invoke the aid of the statute, which favors a class to which he does not belong.”

The next case in point of time in which the Supreme Court considered the statute requiring the acknowledgment and recording of a chattel mortgage is in the case of *Willamette Casket Co. v. Cross*, 12 Wash. 190. The mortgage there in question was executed and delivered on the 22nd day of December, 1893, and not recorded until the fourth day of May, 1894. Between those dates the mortgagor had become indebted to creditors represented by the receiver, who on their behalf resisted the foreclosure of the mortgage. No reference is made to the prior case of *Roy v. Scott*, and if the Supreme Court intended to overrule the then existing doctrine they failed to make it clear.

The specific contention of the mortgagee seems to have been that only creditors who had a specific lien could resist the foreclosure. The Supreme Court overruled that contention, and in doing so used the language quoted in the appellees' brief. It is to be noted that this case was decided on a state of facts where the creditors had advanced moneys on the faith of unencumbered ownership of property in the mortgagor, there having been a total failure to record until after the moneys were advanced. On equitable principles constructive fraud might have been deduced from this fact, and the decision of the Supreme Court sustained on that ground alone. The language of the Supreme Court summarizing its decision was as follows:

“The language of the statute and these authorities satisfy us that it was the intention of the Legislature to give no preference to a chattel mortgagee over the claims of creditors who should become such after its execution, *unless it was recorded within a reasonable time after its execution.*”

The next case considered by the Supreme Court is *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499. This case involves priority of rights between a real and chattel mortgage not recorded as a chattel mortgage and without any affidavit of good faith, and issued to and held by the stockholders of the corporation on the one side, and creditors whose position as prior or subsequent creditors we are unable to ascertain from the opinion. The court holds that the burden of showing knowledge of the unrecorded mortgage upon the creditors is on the mortgagee. We do not believe the case is entitled to serious consideration in determining the question now before the Court.

The last case passed upon by our Supreme Court is *Urquhart v. Cross*, 60 Wash. 249. This is the last expression of the Supreme Court on the question and it quotes approvingly, and follows *Roy v. Scott*, 11 Wash. 399. The mortgage therein issued was not acknowledged and had no affidavit of good faith. After the date of the mortgage, the mortgagor incurred certain unsecured obligations on which suit was brought and writs of attachment issued and levied on the property in controversy. Prior to the levy the mortgagor had transferred

his rights in the property to the mortgagee in satisfaction of the debt, and the mortgagee had taken possession. It was contended that for want of any acknowledgment or affidavit of good faith the mortgage was absolutely void as to the subsequent creditor Stever. The court then fully reviewed *Roy v. Scott*, and quoted fully from it, and then concluded:

“Under this ruling the mortgage held by respondent was undoubtedly valid as against the appellant Stever, who had obtained no lien before the respondent had obtained possession and asserted title.”

We insist that the Supreme Court ruling of *Roy v. Scott* has become the rule of property in this state, and its authority is unimpaired by anything which the Supreme Court has said subsequently thereto. In fact, by the most recent expression of the Supreme Court its authority is reinforced, and under it the creditors now claiming under the trustee in bankruptcy are not in a position to take advantage of the highly technical points insisted upon by the trustee.

III.

It seems from the appellees' discussion under the head of THIRD B that we did not succeed in making our position clear as to the rights of the trustee in bankruptcy, although beginning on page 15 of our brief we attempted to do so. It seems to us clear that under Section 47a as amended by the Act

of 1910, the trustee in bankruptcy has all the rights, but no more than all the rights, which the creditors whom he represents would have had in the absence of bankruptcy, and assuming that these creditors reduced their claims to judgment, or otherwise by legal or equitable proceedings obtained a lien. The statute is so clear that it does not seem that much discussion would be required on this point. The cases relied upon by appellees under the head of THIRD B neither narrow nor amplify the rule which we stated in our brief. If the creditors represented by the trustee are none of them in position to resist the mortgage, and if none of them could get in position in the absence of bankruptcy proceedings to attack the mortgage, it is difficult to see how the trustee can do so. See Collier, Bankruptcy, 9th Edition, p. 659 *et seq.*, for full discussion, with cases.

We conceive the rule to be that we are no better off because of the appointment of a trustee in bankruptcy in asserting our rights under the mortgage, but we think it equally clear that we are no worse off.

If there were no bankruptcy proceedings, the most the creditors could do under this state law would be reduce their claims to judgment, levy execution and sell the property. They would then acquire exactly the rights which their judgment debtors have and would not be bona fide purchasers.

Dawson v. McCarty, 21 Wash. 314, and other cases cited on page 22 of our brief.

IV.

Under the figure 14, on page 7 of their brief, appellees claim that Heath and Leach were not the sole owners of the stock of the corporation at the time of the execution of the mortgage, but that Effie McKenzie was the owner of an undivided one-half interest in 40 shares. Inasmuch as it clearly appears that Mrs. McKenzie's rights were equitable only, and that on the books of the company the stock stood in Heath's name, and that Effie McKenzie thereafter obtained judgment, not for the stock, but for the conversion of the stock, there is nothing in that situation which would militate against our position that the corporation is estopped by the act of the president and secretary, both the members of the board, and all the record stockholders, in executing this mortgage, and in accepting and retaining the benefit thereof.

On the affidavit of Samuel McMurran appellees assert that the indebtedness to the Pacific State Bank was a pre-existing indebtedness. McMurran deduces this conclusion from an audit made by him of the books of the Raymond Box Company, and he does not allege any personal knowledge of the facts.

Paragraph 3 of the petition of the Pacific State

Bank initiating this proceeding begins as follows: "That heretofore, and on or about the second day of December, 1910, the petitioner loaned to the bankrupt the sum of \$23,400," in consideration of which the note was given and the mortgage executed. This paragraph is specifically admitted by the answering creditors. (Transcript, p. 30.)

The affidavit of Miles Leach, page 59, Transcript, is "that on or about the 2nd day of December, 1910, said Raymond Box Co. became indebted to the Pacific State Bank of South Bend in the sum of \$23,400," etc., said indebtedness being identified as the same indebtedness now in question. Leach was the secretary of the company and familiar with its books and affairs, and makes affidavit that he knows approximately the date (when) the indebtedness due each creditor was contracted.

The positive allegation of the petitioner and the explicit admission of the answering creditors and the positive affidavit of the secretary, who had actual knowledge of the affairs of the company and the dates when the indebtedness was incurred, all corroborate the presumption of law that the indebtedness was incurred at the date of the note, and if the point is material, which we doubt, we think the court would not be justified in finding that any part of the indebtedness was incurred prior to the date of the note and mortgage.

This is the view of the facts taken by Hon. C. H. Hanford, Judge, in deciding the case (Trans., page 102) :

“In my study of the case I did not fail to notice the important facts that the claim of the bank is for a bona fide debt due and owing to it by the bankrupt corporation; that credit was given by the bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed to have been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon,” etc.

We respectfully insist that the error of the court below is apparent and should be reversed.

Respectfully submitted,

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